

Joseph M. Alioto (SBN 42680)
Tatiana V. Wallace (SBN 233939)
ALIOTO LAW FIRM
One Sansome Street, 35th Floor
San Francisco, CA 94104
Telephone: (415) 434-8900
Email: jmalieto@aliotolaw.com

[Additional Counsel Listed on Last Page]

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Christine Whalen, Katherine Arcell, Jose
Brito, Jan Marie Brown, Rosemary
D'Augusta, Brenda Davis, Pam Faust,
Carolyn Fjord, Don Freeland, Donald Fry,
Gabriel Garavanian, Harry Garavanian,
Jocelyn Gardner, Valarie Jolly, Michael
Malaney, Len Marazzo, Lisa McCarthy,
Tim Nieboer, Deborah Pulfer, Bill
Rubinsohn, Sondra Russell, Clyde Stensrud,
Gary Talewsky, Pam Ward,

Plaintiffs,

v.

Kroger Co., Albertsons Companies, Inc.,
and
Cerberus Capital Management, L.P.,

Defendants.

Case No.: 23-cv-00459-VC

**SECOND AMENDED COMPLAINT
CHARGING THAT THE KROGER
ACQUISITION OF ALBERTSONS
IS A VIOLATION OF SECTION 7
OF THE CLAYTON ANTITRUST ACT,
15 U.S.C. §18**

Jury Trial Demanded for All Issues at Law

1 PROLOGUE

2 “The quantity of grocer goods, for example, which can be sold in a
3 particular town, is limited by the demand of that town and its neighbourhood.
4 The capital, therefore, which can be employed in the grocery trade cannot
5 exceed what is sufficient to purchase that quantity. If this capital is divided
6 between two different grocers, their competition will tend to make both of
7 them sell cheaper, than if it were in the hands of one only; and if it were
8 divided among twenty, their competition would be just so much the greater,
and the chance of their combining together, in order to raise the price, just so
much the less. . . . It can never hurt either the consumer, or the producer; on
the contrary, it must tend to make the retailers both sell cheaper and buy
dearer, than if the whole trade was monopolized by one or two persons.”¹

9 Adam Smith, *The Wealth of Nations*, Book II, Chapter V,
10 University of Chicago Press, ed. Edwin Cannan

11 INTRODUCTION

12 1. This is a private antitrust action brought under the authority of Section 16 of
13 the Clayton Antitrust Act (15 U.S.C. § 26)² charging violations of Section 7 of the Clayton
14 Antitrust Act³ (15 U.S.C. § 18) seeking a permanent injunction to prohibit Kroger Co. from
15 acquiring Albertsons Companies.
16

17 2. Section 16 of the Clayton Act authorizes private Plaintiffs to enjoin a violation
18 of the antitrust laws against “threatened loss or damage”. The “threatened loss or damage” to
19 the Plaintiffs and to the public at-large is the potential elimination of Kroger’s competitor,
20 Albertsons, and the threat that prices for food and other grocery products may be raised,
21

22 ¹ “Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant
23 ‘economic’ or ‘geographic’ market is not an adequate ground on which to dismiss a s 7 case.” *U.S. v. Pabst*, 384
U.S. 546, at 549.

24 ² “Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court
25 of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of
the antitrust laws . . .” (Emphasis Added) 15 U.S. Code Section 26.

26 ³ Section 7 of the Clayton Antitrust Act provides in pertinent part as follows: “No person engaged in commerce
27 or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or
other share capital . . . where in any line of commerce or in any activity affecting commerce in any section of the
28 country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.”
(Emphasis added.)

1 production may be limited, services may be curtailed, quality may be lessened, and
2 innovations may not be pursued.

3 3. Section 7 of the Clayton Act prohibits acquisitions where the effect “*may* be
4 substantially to lessen competition or tend to create a monopoly.” Lessening of competition is
5 irreparable injury.

6 4. The proposed acquisition *may* lessen competition and therefore should be
7 enjoined in its *incipiency*.

8 5. If it is shown that the “acquisition *may* be substantially to lessen competition or
9 tend to create a monopoly . . . *in any section of the country*”, that is sufficient to prove a
10 violation under the law.

11 6. The proposed acquisition price is not trivial: \$24.6 billion in cash.

12 7. There has been a substantial trend of acquisitions in the industry, particularly
13 by Kroger and Albertsons, which have methodically acquired substantial numbers of
14 independent, small, medium and large grocery stores and chains, culminating in this proposed
15 acquisition between the largest grocery store chain and the second largest grocery store chain
16 in the United States amounting to an entity that is three times larger than its next closest
17 competitor by revenue and market share.

18 8. The proposed acquisition of Albertsons and Kroger grocery stores is the largest
19 in the US grocery industry in history. Kroger’s acquisition of Albertsons eliminates a
20 significant competitor and rival.

21 9. Together, Kroger and Albertsons would form a national company with 4,996
22 stores, 66 distribution centers, 52 manufacturing plants, 2,015 gas stations and more than
23 710,000 associates across 48 states and the District of Columbia. The merged entity also
24 would be the fifth-largest retail pharmacy operator by locations, with 3,972 pharmacies. The
25
26
27
28

1 top five retail grocery store chains control 66% of all retail sales in the United States. The
2 acquisition of Albertsons by Kroger would reduce that number to four. This market power is
3 hidden in the marketplace because the large corporations hide behind subsidiary “banners”. If
4 you shop at a Ralph’s, Food 4 Less, or Smith’s Food and Drug, the profits funnel directly into
5 the same company — Kroger.

6
7 10. In furtherance of the acquisition, and as one of the necessary considerations for
8 the acquisition, Kroger and Albertsons agreed that Albertsons would pay \$4 billion, the full
9 amount of its profit for the preceding year, to certain shareholders, thereby requiring
10 Albertsons to accept the acquisition by Kroger.

11
12 11. In furtherance of the violation, and as an incentive to secure the cooperation of
13 Albertsons for the acquisition, Kroger agreed to pay Albertsons \$318,000,000 if the
14 acquisition is not consummated.

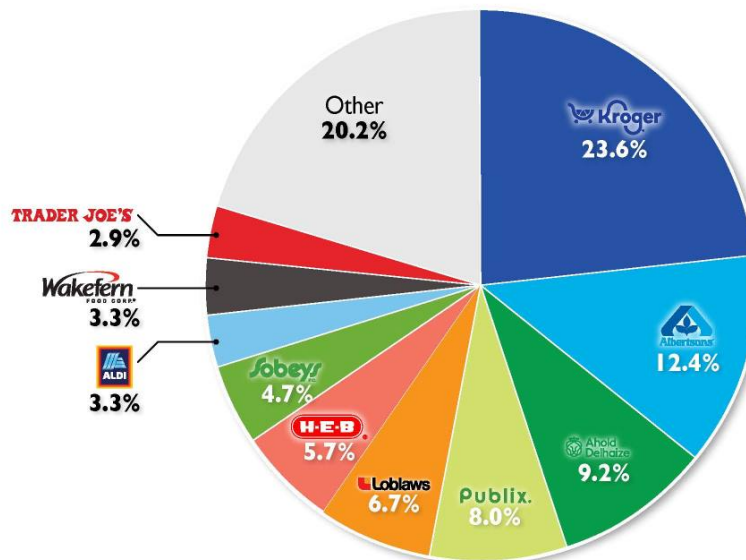
15
16 12. Kroger’s plan to acquire rival Albertsons will combine the largest and second-
17 largest supermarket companies in the country by sales, thereby not only substantially lessening
18 competition but also tending to create a monopoly in the sale of grocery goods and to create a
19 monopsony in the purchase of goods from farmers, wholesalers and distributors of grocery
20 products. The current trend toward concentration, the lessening of competition and the
21 tendency to create a monopoly and monopsony in the grocery industry is unmatched and
22 unparalleled in the history of the industry.

23
24 13. The proposed acquisition is a violation of Section 7 of the Clayton Antitrust
25 Act (15 U.S.C. § 18) because the effect of the elimination of Albertsons may be “substantially
26 to lessen competition or tend to create a monopoly” in the grocery industry by the elimination
27 of a significant competitor in a non-trivial transaction.
28

14. Kroger is the largest supermarket operator by revenue, and Albertsons is the second-largest supermarket chain in America after Kroger. The combination of these two giants will create a supermarket behemoth with a combined market share and control of 36% of the U.S. grocery supermarket operators and with a combined annual sales of more than \$200 billion, more than the amount stated by the Supreme Court of the United States that will constitute a violation of Section 7 of the Clayton Act.

15. According to the SupermarketNews.com, a nationally accepted Commercial Publication and Market Report, the following chart demonstrates not only the significant market shares of the defendants Kroger and Albertsons, but also those of all of the remaining significant, relevant competitors in the national grocery supermarket market.

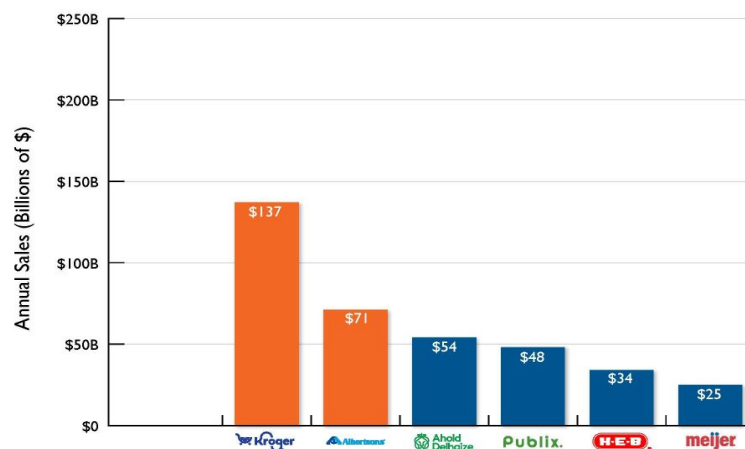
Domestic Market Share of U.S. Grocery Supermarket Operators*



* As of 2020
Source: www.supermarketnews.com/retail-financial/top-25-supermarket-operators-sales

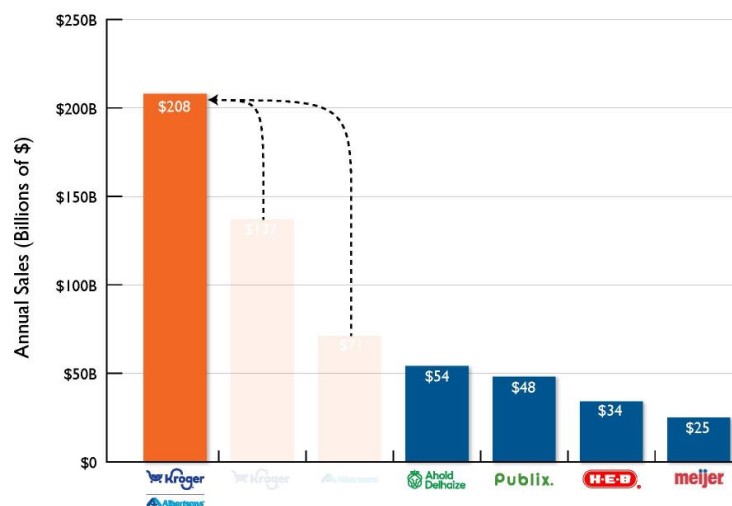
16. According to SupermarketNews.com, the following bar charts demonstrate that the acquisition will be almost four times the amount of the next closest competitor and nearly 1.3 times the total sales of the next four competitors combined, showing the enormity and the substantial potential anticompetitive effects of this proposed acquisition.

Rankings of Top U.S. Grocery Supermarket Operators Annual Sales (Pre-Acquisition - 2021)



Source: www.foodindustry.com/articles/top-10-grocers-in-the-united-states-2019

Rankings of Top U.S. Grocery Supermarket Operators Annual Sales (Post-Acquisition)



Source: www.foodindustry.com/articles/top-10-grocers-in-the-united-states-2019

1 17. The proposed acquisition is prohibited nationally, regionally and locally by the
2 binding authority of the Supreme Court of the United States as enunciated in its decisions in
3 *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), *United States v. Philadelphia National*
4 *Bank*, 374 U.S. 321 (1963), *United States v. Aluminum Company of America*, 377 U.S. 271
5 (1964), *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), *United States v. Pabst*
6 *Brewing Co.*, 384 U.S. 546 (1966), and *United States v. Falstaff Brewing Corporation*, 410
7 U.S. 526 (1973).

9 18. Ironically, two of the grocery supermarket chains involved in two of the
10 controlling decisions by the Supreme Court, *Von's* and *American Stores* (the attempt by the
11 Lucky Stores chain to buy the Alpha Beta chain), were ultimately purchased by Albertsons,
12 which Kroger now seeks to consume by acquiring Albertsons.

13 19. This private action is specifically authorized under Section 16 of the Clayton
14 Antitrust Act (15 U.S.C. § 26) which provides that “any person [including members of the
15 public]...shall be entitled to sue and have injunctive relief ...against threatened loss or damage
16 by a violation of the antitrust laws.”

17 20. The remedy afforded to private plaintiffs includes the prohibition of the
18 potential unlawful acquisition at its incipency. As was unequivocally stated by the United
19 States Supreme Court in *California v. American Stores Company*, 495 U.S. 271, 283 (1990),
20 “[T]he literal text of Section 16 is plainly sufficient to authorize injunctive relief [in favor of a
21 private Plaintiff], including an order of divestiture, that will prohibit that conduct from causing
22 that harm.” The acquisition is ripe to be enjoined under the authority of the Supreme Court
23 which has stated time and time again that these acquisitions must be enjoined at their
24 “incipency”; namely, at the very beginning, once the acquisition is announced *Brown Shoe*,
25 *supra*; *Von's*, *supra*; *Pabst*, *supra*.

21. Under Section 7 of the Clayton Act, which provides that a violation may be shown from the lessening of competition in any section of the country, all that is necessary to show is that a lessening of competition may occur “somewhere in the United States – ‘in *any* section’ of the United States.” The Court stated as follows:

“We first take up the court's dismissal based on its conclusion that the Government failed to prove either Wisconsin or the three-state area constituted ‘a relevant section of the country within the meaning of Section 7.’ Apparently the District Court thought that in order to show a violation of s 7 it was essential for the Government to show a ‘relevant geographic market’ in the same way the corpus delicti must be proved to establish a crime. But when the Government brings an action under s 7 it must, according to the language of the statute, prove no more than that there has been a merger between two corporations engaged in commerce and that the effect of the merger may be substantially to lessen competition or tend to create a monopoly in any line of commerce ‘*in any section of the country.*’ (Emphasis supplied.) The language of this section requires merely that the Government prove the merger may have a substantial anticompetitive effect somewhere in the United States—‘in any section’ of the United States. This phrase does not call for the delineation of a ‘section of the country’ by metes and bounds as a surveyor would lay off a plot of ground. The Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened throughout the country, or on the other hand it may prove that competition may be substantially lessened only in one or more sections of the country. In either event a violation of s 7 would be proved. Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant ‘economic’ or ‘geographic’ market is not an adequate ground on which to dismiss a s 7 case. Compare *United States v. Continental Can Co.*, 378 U.S. 441, 458, 84 S.Ct. 1738, 12 L.Ed.2d 953. Congress did not seem to be troubled about the exact spot where competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country. Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every s 7 case which is whether a merger may substantially lessen competition anywhere in the United States.” *U.S. v. Pabst*, 384 U.S. 546, at 549. (Underlining added.)

22. Private actions to vigorously challenge anticompetitive acquisitions have been encouraged by the Congress and the Supreme Court of the United States in strong and unmistakable language: “The Act’s other provisions manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers.” *California v. American Stores Company*, 495 U.S. 271, 284 (1990).

1 23. Plaintiffs therefore bring this action under the authority of Section 16 of the
2 Clayton Antitrust Act (15 U.S.C. § 26) and allege that the pending elimination of Albertsons
3 by Kroger constitutes a substantial threat of injury and potential damage to these Plaintiffs
4 because this acquisition may have the effect “substantially to lessen competition” and “tend to
5 create a monopoly” in a “line of commerce” in a “section of the country” in violation of
6 Section 7 of the Clayton Antitrust Act (15 U.S.C. § 18). In addition, the contract to eliminate
7 Albertsons constitutes a non-trivial transaction between significant rivals, neither of which is a
8 failing company, that may eliminate a substantial and growing competitor from the market.
9

10 24. Prior to the proposed acquisition, both Kroger and Albertsons have
11 demonstrated their willingness and intention to expand into markets throughout the United
12 States. As a result, Kroger and Albertsons directly compete in many sections of the country,
13 including where Plaintiffs live and shop for groceries. In addition to the actual competition in
14 sections of the country where Kroger and Albertsons are direct competitors, the agreement
15 also eliminates the potential competition of Kroger expanding into markets where Albertsons
16 already is, and Albertsons expanding into markets where Kroger already is.
17

18 25. For example, as part of the acquisition agreement, Kroger would purchase the
19 Albertsons stores in the northeastern United States rather than expanding into that market on
20 its own in competition with the Albertsons stores that are already there. By acquiring the
21 Albertsons stores in the northeast United States lock, stock and barrel, the potential
22 competition that would otherwise result from Kroger expanding into that market on its own in
23 competition to the Albertsons stores there is eliminated and, in turn, the future potential
24 competition from Albertsons entering markets where Kroger exists would also be eliminated.
25 Kroger’s business plan to simply take over the Albertsons stores and substitute its name for
26
27
28

1 the Albertsons marquee in the northeast has already been found to be unlawful and has been
2 enjoined by the Supreme Court in *Falstaff, supra*, 410 U.S. 526 (1973).

3 26. The proposed acquisition substantially affects the interstate and foreign
4 commerce of the United States in that supermarket supplies, food and other consumer items
5 and all the other necessities of the grocery supermarket industry are in the constant flow of the
6 interstate and foreign commerce of the United States. Because Defendants transact business
7 in this judicial district, venue is proper in this Court pursuant to 15 U.S.C. §§15, 22 and 26,
8 and 28 U.S.C. § 1391.

10 27. Plaintiffs seek an Order from this Court prohibiting the proposed acquisition by
11 Kroger of Albertsons that would eliminate Albertsons as a significant actual and potential
12 competitor.

13 28. Plaintiffs also seek an order to prohibit the acquisition and to require Kroger to
14 repay the \$4 Billion that was paid by Albertsons as part of the consideration for the
15 acquisition.

17 29. The relevant product market is the retail sale of food and other grocery
18 products through grocery supermarket chains. The relevant geographic market is the entire
19 United States, the individual States of the United States, and the regional and local geographic
20 markets within individual states, in “any section of the country”.

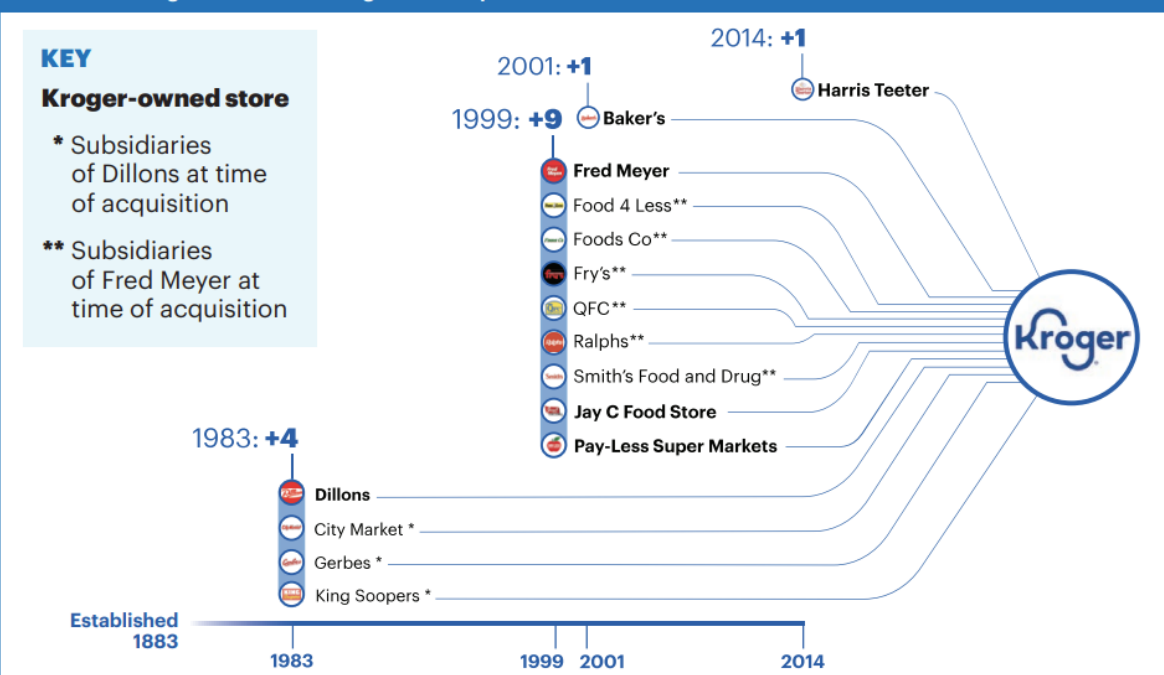
21 30. The grocery supermarket industry is a critical and vital modern necessity to the
22 commercial, social and political well-being of the United States. Competition rather than
23 combination has been and should be enforced in the United States so that these Plaintiffs, and
24 the public at large, may enjoy the benefits of competition, including, *inter alia*, the best
25 possible goods and services at the lowest possible prices. Vigorous enforcement of the
26 antitrust laws by private persons is an essential part of the Congressional plan to ensure that
27
28

competition rather than monopoly is, and remains, the rule of trade in the United States, especially in the grocery supermarket industry.

31. From 1993 to 2019, the number of grocery stores nationwide declined by roughly 30 percent. Food industry mergers and acquisitions exceeded 300 in 2019 alone. The U.S. grocery supermarket industry is moving ineluctably toward complete concentration and monopoly, a fact that is dramatically illustrated by Defendant Kroger's past mergers and acquisitions (see Chart Following) and that is further demonstrated in this Albertsons acquisition.

The Economic Cost of Food Monopolies: The Grocery Cartels

FIG. 2: How Kroger^b became the largest U.S. supermarket chain



^b Kroger is the second largest retailer of groceries (behind Walmart Supercenters and Sam's Clubs) and the largest supermarket chain.

4

32. Similar to Kroger, Albertsons has purchased major grocery store chains, including:

⁴ Source: Foodandwaterwatch.org *The Economic Cost of Food Monopolies: The Grocery Cartels*. Nov 2021.

1 Albertsons

2 Safeway

3 Vons

4 Jewel-Osco

5 Shaw's

6 Acme

7 Tom Thumb

8 Randall's

9 United Supermarkets

10 Pavilions

11 Star Market

12 Haggen

13 Carrs

14 Kings Food Markets

15 Balducci's Food Lovers Market

18 33. This trend toward concentration was unanimously condemned by Chief Justice
19 Warren in the Supreme Court opinion in *Brown Shoe Co. v. United States*, *supra*, which
20 made it clear that 1) the Court should and would take steps to curtail *incipient* acquisitions
21 whose effect *may* be to eliminate competition in an industry and 2) that an acquisition is ripe
22 for adjudication at the point of agreement: "We cannot avoid the mandate of Congress that
23 tendencies toward concentration in industry are to be curbed in their incipency, particularly
24 when those tendencies are being accelerated through giant steps striding across a hundred
25 cities at a time. In the light of the trends in this industry we agree with the Government and
26 the court below that this is an appropriate place at which to call a halt." *Id.* at 346.
27
28

34. If Kroger’s proposed acquisition of Albertsons is consummated, the companies’ combined power “may” be used to increase prices for groceries, decrease the quality of food and other goods, eliminate jobs, close stores and offer less choice for consumers.

35. And contrary to the suggestion by the Defendants that there are or will be divestitures of stores before the acquisition, no divestitures have been made to date, nor will they be made until and unless the acquisition of Albertsons by Kroger is consummated. Further, any suggestion or agreement of divestiture should not be considered when weighing the antitrust violation because the divestiture of stores is speculative, and because, even if it were not speculative, subsequent divestiture is not relevant because, as the Supreme Court has stated time and time again, these acquisitions must be judged at their very beginning, or “incipiencies,” which in this case was October 13, 2022.

36. Moreover, post-acquisition agreements have been held to be entitled to little or no weight because these sales are often engineered and “manipulated” for litigation purposes:

“We agree with the Commission that it was not required to take account of a post-acquisition transaction that may have been made to improve Hospital Corporation's litigating position. . . Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight. [Citation Omitted.] The Commission was entitled to give it no weight in this case . . . ”⁵

37. Indeed, four Senators and two Representatives of the United States Congress have publicly noted that so-called “divestitures” consistently fail; do not achieve the purposes of Section 7; “cease to be binding once the term of the agreement ends”; “fail to maintain competitive conditions because . . . companies have an incentive to ensure that the businesses they spin off do not succeed”; and “encourage companies to ‘litigate the fix’ by proposing

⁵ *Hospital Corporation of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986).

1 remedies during ongoing litigation in order to distract a judge’s focus from the original
2 antitrust violations of the merger.”⁶

3 38. Furthermore, as the Congressional Leaders pointed out: 1) the Kroger
4 acquisition of Albertsons would result in the five largest food retail companies controlling
5 55% of all grocery sales in the United States; 2) the resulting entity “may” use its dominance
6 to control and raise consumer prices; 3) the merged company’s dominance would be felt most
7 directly at the regional and local levels and “may” result in a Kroger monopsony or a duopoly
8 with Walmart with the two corporations controlling more than 70% of the grocery market in
9 more than 160 cities across the country;⁷ 4) on the “buy side”, as Adam Smith had predicted,
10 a grocery mega-merger would increase the risk that the merged firm would violate the
11 Robinson-Patman Act, which prohibits price discrimination, by pressuring food suppliers –
12 and especially C&S which will be beholden to Kroger – to provide it with preferred pricing
13 and terms that may not be available to Kroger’s smaller competitors; 5) price discrimination
14 impairs independent and smaller grocers’ ability to compete on price and even on quality;
15 and 6) the merger will ultimately decrease the smaller grocery suppliers’ buying power
16 thereby encouraging those suppliers themselves to consolidate, or collude in violation of the
17 Sherman Act, in order to counter balance the bargaining power of the new Kroger
18 monopsony and/or Kroger/Walmart duopoly.
19
20
21

22 39. In addition, the sale of Kroger and Albertson stores to C&S is suspect because
23 (1) the sale was not subject to competitive bidding; (2) it is contingent on the acquisition
24 being approved and, if disapproved, the sale to C&S “may” be annulled and; (3) the sale may
25

26 ⁶ Letter dated December 11, 2023 to Honorable Lina Khan, Chair, Federal Trade Commission, from United
27 States Senators Warren, Hirono, Sanders and Booker and U.S. Representatives Lee and Ocasio-Cortez. Senator
28 Sanders Chairs the Health, Education, Labor and Pensions Committee of the U.S. Senate.

⁷ See Institute for Local Self-Reliance, “Americans Don’t Need Another Mega-Grocer”, Stacy Mitchell, October
14, 2022, <https://ilsr.org/statement-kroger-albertsons-merger/>.

1 itself be in violation of Section 7 because the sale of the spun-off stores may itself lessen the
2 actual or potential competition of C&S, the recipient of the stores, which would otherwise
3 compete against Defendants by expanding its existing stores against Kroger and Albertsons in
4 those markets where stores are spun off and in other markets. The Defendants are, in effect,
5 buying and selling markets instead of competing for them.










6
7 40. In addition, this attempted “divestiture” may not be a viable sale. Past
8 supermarket divestitures have struggled within months of being separated and have
9 ultimately failed. A good example of this eventuality is the Albertsons acquisition of
10 Safeway in 2015 in which the Safeway stores that were divested for the purpose of
11 attempting to pass muster with the FTC eventually struggled and many have failed. When
12 the Safeway stores were spun off by Albertsons in its acquisition of Safeway, the entity that
13 purchased the spun off stores was unable to meaningfully compete and soon declared
14 bankruptcy.

15
16 41. Unless this acquisition of the first and second largest national competitors in
17 retail sales last year among the U.S. food and grocery supermarket operators is prohibited, the
18 unified company will become the largest supermarket by revenue in the United States with a
19 current national market share of 36%. And Albertsons, a competitor with a national market
20 share of 12.4%, will be eliminated.

21
22 42. Market concentrations with much lower percentages have in the past been held
23 by the Supreme Court to constitute a violation of Section 7 of the Clayton Act. *See United*
24 *States v. Aluminum Company of America*, 377 U.S. 271 (1964) (elimination of Rome Cable
25 with only 1.3% share of national market), and *United States v. Pabst Brewing Co.*, 384 U.S.
26 546 (1966) (nos. 10 and 18 in the national market becoming no. 5 with 4.9%). (See Chart
27 Following.)
28

Key Section 7 Cases

Market Share and Rankings, Pre-Merger vs. Post-Merger

Acquiring Company Market Share	Acquired Compan(ies) Market Share	Merged Entity Market Share	Result
 <ul style="list-style-type: none"> • 4.7% share • #3 in market 	 <ul style="list-style-type: none"> • 4.2% share • #6 in market 	<ul style="list-style-type: none"> • 7.5% share • #2 in market 	ENJOINED
 <ul style="list-style-type: none"> • 27.8% share • #1 in market 	ROME CABLE <ul style="list-style-type: none"> • 1.3% share • #9 in market 	<ul style="list-style-type: none"> • 29.1% share 	ENJOINED
 <ul style="list-style-type: none"> • 5.48% share tri-state • #10 nationwide • #4 statewide (WI) • #7 tri-state (WI, Ill, Mich) 	 <ul style="list-style-type: none"> • 5.84% share tri-state • #18 nationwide • #1 statewide (WI) • #6 tri-state (WI, Ill, Mich) 	<ul style="list-style-type: none"> • 11.32% share tri-state • #5 nationwide • #1 statewide (WI) • 4.49% share nationwide • 23.95% share statewide 	ENJOINED
 <ul style="list-style-type: none"> • 6% manufacturing share • #3 in manufacturing 	 <ul style="list-style-type: none"> • .05% manufacturing share • #12 in manufacturing • 2% retail share 	<ul style="list-style-type: none"> • 6% manufacturing share • #3 in manufacturing • 9.5% retail share • #2 in retail market 	ENJOINED
 <ul style="list-style-type: none"> • #2 in market 	 <ul style="list-style-type: none"> • #3 in market 	<ul style="list-style-type: none"> • #1 in market • 36% share (of assets) 	ENJOINED

14

43. And in two major cases involving the grocery industry, the Supreme Court condemned the grocery store acquisitions as violations of Section 7 of the Clayton Act. The

1 first dealt with a small area of the country, the Los Angeles market, where the combination of
2 the no. 3 and no. 6 groceries becoming the no. 2 grocery with 7.5% of the market in Los
3 Angeles was outright condemned by the Court. *United States v. Von's Grocery Co.*, 384 U.S.
4 270 (1966).

5 44. The second was the *American Stores* case in which the Court granted injunctive
6 relief to the private plaintiff, and ultimately ordered the divestiture of the stores under the
7 merger.
8

9 45. Here the combination of Albertsons and Kroger “may” result in the eradication
10 of consumer choice, and “may” have other anticompetitive effects that may, and most
11 probably will, flow from the elimination of Albertsons from the market. If, however, Kroger,
12 instead of combining with Albertsons, were to compete for market share rather than buying
13 its way there, it would have the wherewithal, the experience, the knowledge, and the ability
14 to expand on its own, all of which would necessarily increase competition, lower prices,
15 necessitate new jobs, increase consumer choice, invite investment, and otherwise enable the
16 consumer to enjoy the benefits that competition always provides.
17

18 46. The United States Supreme Court found it fundamental to free-market
19 economies that “Internal expansion [through competition] is more likely to be the result of
20 increased demand for the company’s products and is more likely to provide increased
21 investment in plants, more jobs and greater output. Conversely, expansion through
22 acquisition is more likely to reduce available consumer choice while providing *no increase in*
23 *industry capacity, jobs or output*. It was for these reasons, among others, Congress expressed
24 its disapproval of successive acquisitions. Section 7 was enacted to prevent even small
25 acquisitions that added to concentration in an industry.” *Brown Shoe Co. v. United States*,
26 370 U.S. 294 (1962), at fn. 72 (emphasis added).
27
28

1 47. The proposed elimination of Albertsons by Kroger poses a substantial threat to
2 the Plaintiffs, and to the public at large, in that the proposed elimination “may” only serve, as
3 the Supreme Court warned, to “reduce available consumer choice while providing no
4 increase in industry capacity, jobs or output,” and may potentially cause loss to the Plaintiffs,
5 and the public at large, in the form of higher prices for food and other consumer goods, the
6 elimination of consumer choice and other potential anticompetitive effects which deprive the
7 Plaintiffs, and the public at large, of the salutary benefits of competition.

8 48. The importance of the products that supermarkets sell and the services and
9 innovations that they provide to residents means that any material reduction in a supermarket
10 competitor’s ability to compete can harm those residents in ways that are far from
11 hypothetical. As is customary in these acquisitions, the first casualties “may” be the workers
12 who are fired because they were only needed when the competition existed. Staffing “may”
13 decrease, leading to worse service for consumers and worse conditions for workers. Prices
14 “may” go up, and promotions “may” decrease, and that translates directly into the quantity
15 and quality of food that families can put on their tables.

16 49. The elimination of Albertsons is manifestly an irreparable harm since the
17 competition from Albertsons would be an irretrievable loss.

18 50. Should the proposed elimination of Albertsons go unchallenged, the nation
19 would not only lose the competition of Albertsons, but also the potential competition that
20 Kroger would provide by further building its own national presence the old-fashioned way:
21 by competing for customers instead of buying them. The proposed elimination of Albertsons,
22 therefore, “may” not only eliminate the stout and particular competition of Albertsons, but
23 “may” also discourage continued vigorous competition from Kroger and “may” ultimately
24
25
26
27
28

lessen the economic ideal espoused by Congress and the Supreme Court of more consumer choice made more available through competition.

THE PARTIES

Plaintiffs

51. The Plaintiffs named below are individual citizens of the cities and states listed. Each Plaintiff is a consumer and customer of the Defendants, all with an express interest and intent in ensuring that Albertsons stores are preserved as a competitive option for them, now and in the future. Plaintiffs have made purchases at the Defendants' stores within the last four years. The actual and potential elimination of Albertsons "may" cause loss and harm to the Plaintiffs, and to the public at large, of the salutary benefits of the competition that Albertsons brings, as well as the opportunity to shop at Albertsons.

Christine Whalen, New Orleans, LA;
 Gabriel Garavanian, Tyngsboro MA;
 Katherine R. Arcell, New Orleans, LA;
 Jose' M. Brito, Reno, NV;
 Jan-Marie Brown, Carson City, NV;
 Rosemary D'Augusta, Millbrae, CA;
 Brenda K. Davis, Forney, TX;
 Pamela Faust, Loveland, Ohio;
 Carolyn Fjord, Winters, CA;
 Don Freeland, Thousand Palms, CA;
 Don Fry, Tucson, AZ;
 Harry Garavanian, Tyngsboro, MA;
 Yvonne Jocelyn Gardner, Colorado Springs, CO;
 Valarie Ann Jolly, Mabank, TX;
 Michael C. Malaney, Grandville, MI;
 Len Marazzo, Reno, NV;
 Lisa McCarthy, Naples, FL;
 Timothy Nieboer, Clarkston, MI;
 Deborah M. Pulfer, Sidney, OH;
 Bill Rubinsohn, Jenkintown, PA;
 Sondra K. Russell, Waco, TX;
 Clyde D. Stensrud, Kirkland, WA;
 Gary Talewsky, Sharon, MA;
 Pamela S. Ward, Garland, TX.

53. Defendant Kroger Co. (hereinafter “Kroger”) is an American retail company that operates supermarkets and multi-department stores throughout the United States. Founded in 1883 in Cincinnati, Ohio, Kroger operates 2,721 retail grocery stores under its various banners and divisions in 35 states and in the District of Columbia, with store formats that include hypermarkets, supermarkets, superstores, department stores, and jewelry stores. Kroger operates 33 food processing or manufacturing facilities, 1,618 supermarket fuel centers, 2,251 pharmacies, and 225 in-store medical clinics. Kroger's headquarters are located in Cincinnati.

54. Kroger is the United States' largest supermarket operator by revenue, commanding 23.6% of the market. It ranked 17th on the 2018 Fortune 500 list of the largest United States corporations by total revenue. Kroger has expanded by acquisition. Kroger's family of store banners include Kroger, Ralphs, Dillons, Smith's, King Soopers, Fry's, QFC, City Market, Owen's, Jay C, Pay Less, Bakers, Gerbes, Harris Teeter, Pick N' Save, Metro Market, Mariano's, Fred Meyer, Food 4 Less and Foods Co. (See Charts Following).

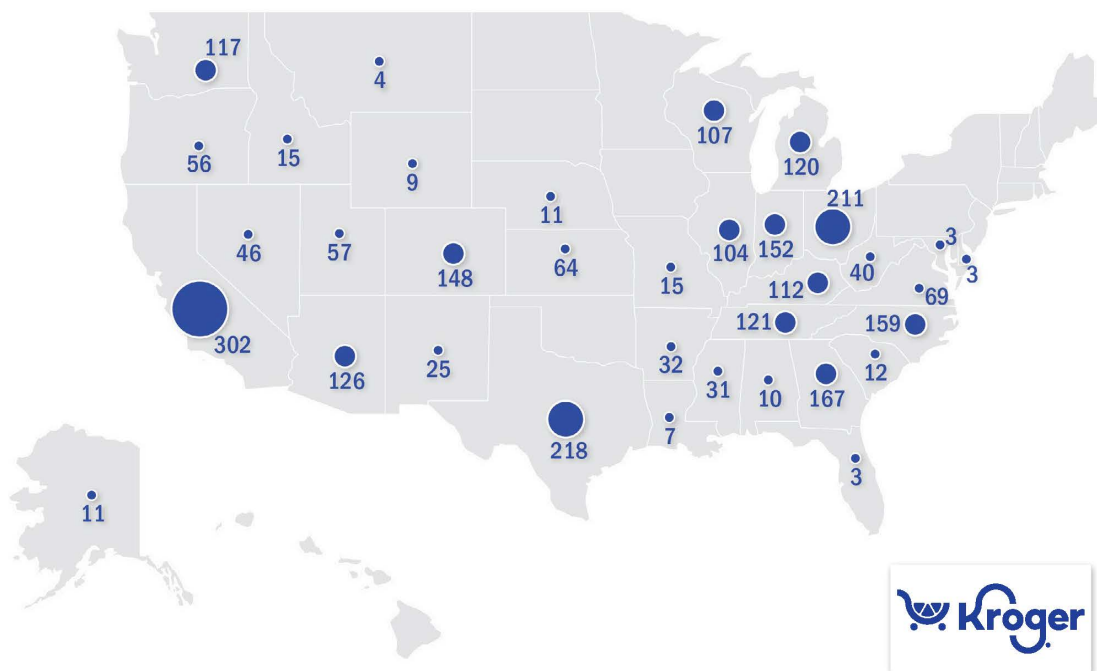
Location of Kroger Stores Nationwide



Source: Kroger Investor Relations

4

Location of Kroger Stores by State



Sources: www.thekrogerco.com/newsroom/state-facts, google.com

7

55. Defendant Albertsons Companies, Inc. (hereinafter “Albertsons”) is an American grocery supermarket operator founded in 1939 and headquartered in Boise, Idaho. With 2,253 stores as of the third quarter of fiscal year 2020 and 270,000 employees as of fiscal year 2019, the company is the second-largest supermarket chain in North America after Kroger, accounting for 12.4 % of the market. Albertsons ranked 53rd on the 2018 Fortune 500 list of the largest United States corporations by total revenue. Prior to its January 2015 acquisition of Safeway Inc. for \$9.2 billion, it had 1,075 supermarkets located in 29 U.S. states under 12 different banners. The Safeway acquisition was the largest grocery acquisition in US history at the time. It gave Albertsons a significant presence in the Western United States.

56. Albertsons' acquisitions have helped the company to expand its reach and become the second-largest grocery retailer in the United States. The company now operates over 2,200 stores in 34 states and the District of Columbia.

57. Albertsons' store base includes such banners as Albertsons, Safeway, Vons, Jewel-Osco, Shaw's, Acme, Tom Thumb, Randall's, United Supermarkets, Pavilions, Star Market, Haggen, Carrs, Kings Food Markets and Balducci's Food Lovers Market. (See Charts Following).

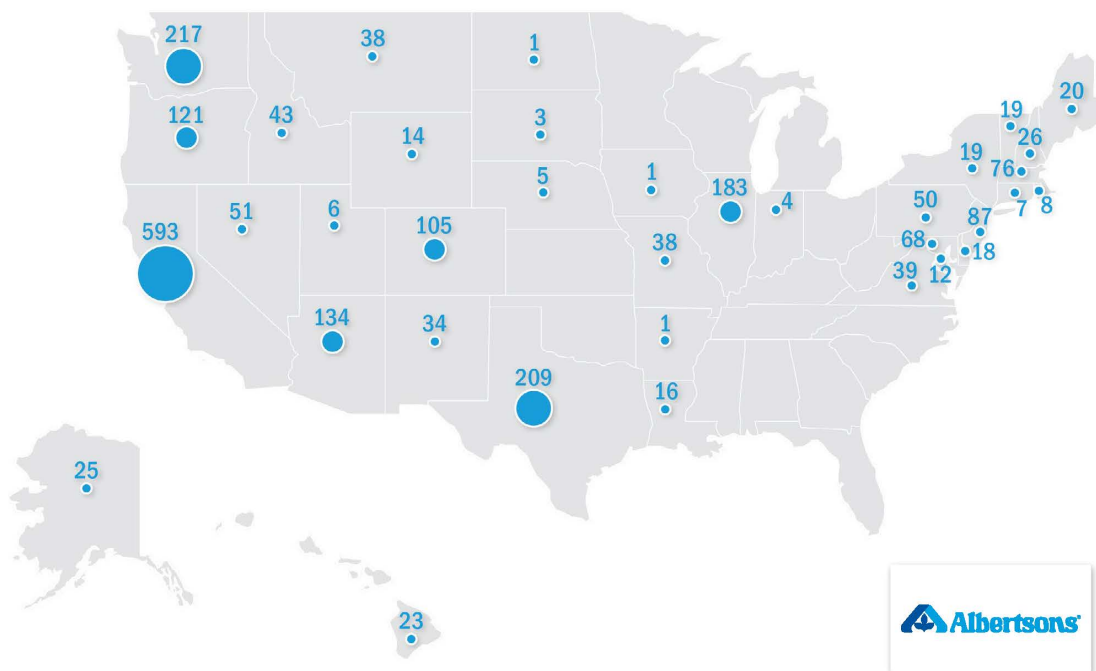
Location of Albertsons Stores Nationwide



Source: Kroger Investor Relations

5

Location of Albertsons Stores by State



Source: www.statista.com/statistics/1167508/albertsons-operating-stores-by-state-us

8

Co-Conspirators

58. Co-conspirator C&S Wholesale Grocers LLC (“C&S”) is a national wholesale grocery supply company in the United States, based in Keene, New Hampshire. In 2021 it was the eighth largest privately held company in the United States, as listed by Forbes. C&S owns the Piggly Wiggly grocery brand, which is independently franchised to store operators, the Grand Union supermarkets brand, as well as several private label brands, including Best Yet. C&S acted in concert with Defendants in furtherance of the violation of Section 7 of the Clayton Act.

59. As of 2021, C&S serviced over 7,700 independent supermarkets, chain stores, military bases and institutions with over 137,000 different products, including produce, meat,

1 dairy products, delicatessen products, fresh/frozen bakery items, health and beauty aids,
2 candy, and tobacco.

3 60. Services range from wholesale procurement, category management, pricing,
4 marketing, advertising, merchandising, business and accounting, store design, and
5 engineering. C&S customers include Giant-Carlisle, Giant-Landover, Safeway
6 Inc., Southeastern Grocers, Target Corporation, and independent store/supermarket
7 owner/operators.
8

9 61. Over the last 22 years, C&S has bought up or eliminated numerous small
10 independent grocery stores. The acquisitions began in 2001 when C&S purchased the Grand
11 Union supermarket chain. In 2005, C&S acquired 104 stores from BI-LO, which operated
12 stores under the BI-LO, Bruno's Supermarkets, Food World, FoodMax and Food Fair brand
13 names. In October 2014, C&S acquired the operations of Piggly Wiggly Carolina Co. In
14 2014, C&S acquired Associated Wholesalers (AWI) which owned the grocery chain Nell's. In
15 2019, C&S acquired Olean Wholesale Grocery, which operated in upstate New
16 York and Pennsylvania.
17

18 62. The acquisition by C&S of certain Kroger and Albertsons stores itself
19 substantially threatens injury and harm to grocery shoppers, lessens competition, both
20 horizontally and vertically, substantially threatens discriminatory pricing in favor of Kroger in
21 violation of Section 2(a) of the Robinson Patman Act, and may, in itself, be a violation of
22 Section 7.
23

24 63. Various additional persons, partnerships, firms, and corporations who are
25 members of the consortium of private equity entities which collectively own approximately
26 75% of Albertsons stock, and other individuals, the identities of whom are presently unknown,
27
28

1 have participated as co-conspirators with Defendants in the offenses alleged in this Complaint,
2 and have performed acts and made statements in furtherance of the illegal contracts,
3 combinations, and conspiracies. When the names of these co-conspirators have been
4 identified, Plaintiffs will seek leave to amend this complaint.

5 64. On October 13, 2022, Albertsons and Kroger (collectively, “Defendants”), who
6 are the two largest horizontal competitors in the sale of groceries and other consumer goods
7 nationally, entered into an “Agreement and Plan of Merger” (“Agreement”). This Agreement
8 is the final and complete agreement between Defendants to consummate an acquisition that
9 they had contemplated and negotiated since June of 2022. Kroger agreed to pay \$24.6 billion
10 in cash to eliminate Albertsons. This is not a trivial transaction.

11 65. As part of the proposed acquisition, Kroger and Albertsons agreed that
12 Albertsons will pay a “special dividend” of \$4 billion, which is more than one-third of
13 Albertsons’ total market capitalization of approximately \$11 billion. The funds for this
14 payment would be sourced from \$2.5 billion of Albertsons’ cash and \$1.5 billion in new debt,
15 resulting in a drop from approximately \$4 billion to \$1.5 billion in Albertsons’ cash and cash
16 receivables, and causing its net debt to increase from \$4.54 billion to \$8.54 billion.

17 66. The payment of this Special Dividend “may” leave Albertsons undercapitalized
18 and “may” impede Albertsons’ ability to compete with other supermarkets, including Kroger,
19 leaving shoppers to face higher prices, worse services, less innovation, and even closure of
20 Albertsons supermarkets. Replacing cash with debt “may” inevitably harm Albertsons’ credit
21 rating, making borrowing more expensive. A financially crippled Albertsons “may” have
22 dire consequences for consumers, who depend upon supermarkets near their homes, for such
23 essentials as fresh meat and produce, among other groceries. If Albertsons is strapped for
24
25
26
27
28

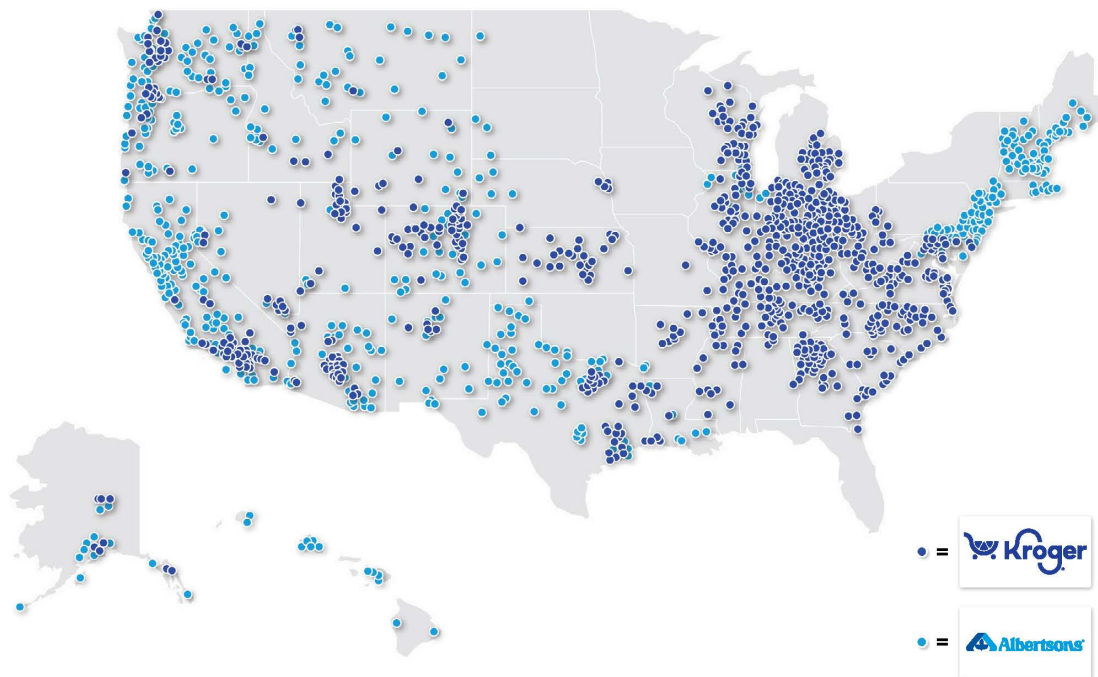
1 cash, it “may” be less able to offer promotions on groceries, less able to offer quality
2 services, and less able to maintain staffing and competitive wages and benefits for workers.

3 67. According to data compiled by Statista, Kroger ranked first in U.S. food and
4 grocery supermarket retail sales last year with \$138 billion in sales for 2021. Albertsons was
5 second overall with \$72 billion in sales last year.

6 68. Collectively, Albertsons and Kroger operate nearly 5,000 stores, employ more
7 than 710,000 associates, run 66 distribution centers, 52 manufacturing plants, nearly 4,000
8 pharmacies and more than 2,000 fuel centers across 48 states and the District of Columbia.
9 The companies’ combined market share of 36% of U.S. grocery supermarket sales will have a
10 combined annual sales of more than \$200 billion.
11

12 69. Supermarkets are already a consolidated industry in the United States.
13 Albertsons and Kroger are two of its largest players and have been historically fierce
14 competitors in numerous States. Defendants claim that their transaction will unite
15 “complementary” companies, but even their own map of store locations makes clear the
16 extent of their competitive. (See Charts Following.)
17
18
19
20
21
22
23
24
25
26
27
28

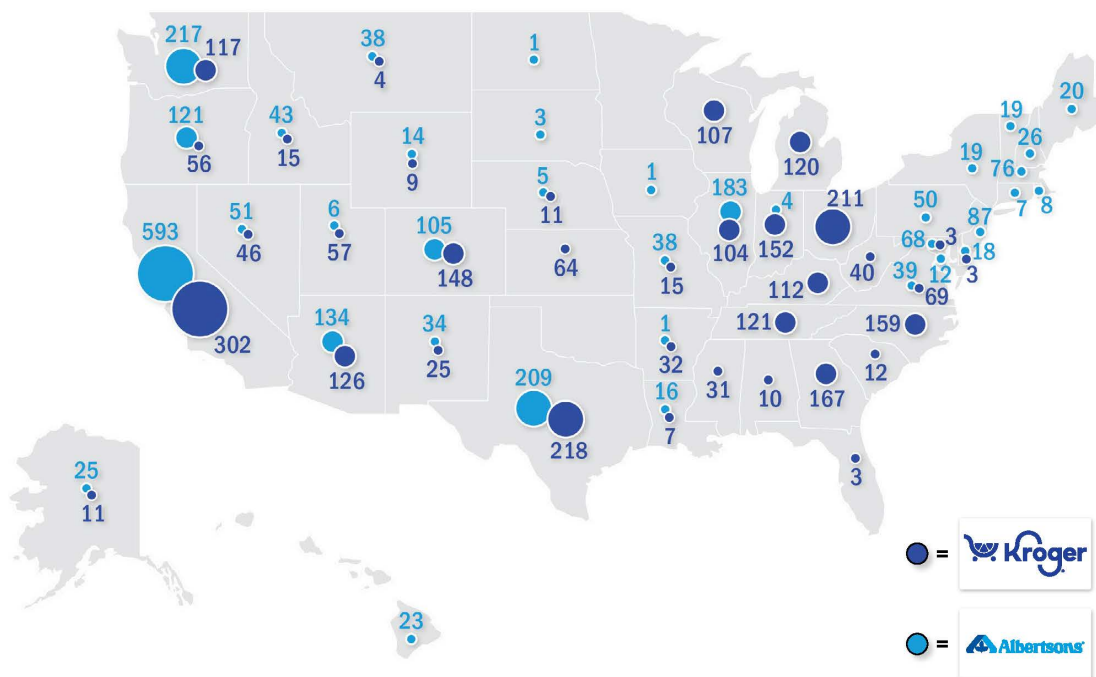
Location of Kroger and Albertsons Stores Nationwide



Source: Kroger Investor Relations

6

Location of Kroger and Albertsons Stores by State



Sources: www.thekrogerco.com/newsroom/state-facts, google.com, www.statista.com/statistics/1167508/albertsons-operating-stores-by-state-us

70. Defendants currently operate competing banners with strong presences across the United States. In some markets, Kroger and Albertsons owned supermarkets compete head-to-head for shoppers' dollars. For example, in California, Kroger owns and operates approximately 214 stores under the Ralphs banner and an additional 19 under Food 4 Less. A majority of these stores are located in Southern California. The Albertsons Company operates approximately 579 grocery stores in California: 125 stores under the Albertsons banner, along with 26 Pavilion, 243 Safeway, and 185 Vons stores. In Chicago, Kroger runs the Mariano's chain and Albertsons operates the competing Jewel-Osco stores. In Seattle, Albertsons owns Albertsons and Safeway while Kroger runs Fred Meyer and QFC.

Relevant Product Market

73. A “Supermarket” is any self-service full-line retail grocery store offering customers substantially all of their weekly food and grocery shopping requirements in a single shopping visit. Supermarkets are larger and have a wider selection of goods than smaller convenience grocery stores but are smaller and more limited in the range of merchandise offered for sale than general-retail big-box stores.

Second Amended Complaint for Violation of Section 7 of the Clayton Act

1 75. Supermarkets provide distinct products and services and offer consumers
2 convenient one-stop shopping for food and grocery products, typically carrying more than
3 10,000 different items, referred to as stock-keeping units (SKUs).

4 76. Supermarkets compete with other supermarkets that provide one-stop shopping
5 opportunities for food and grocery products and base their prices on the prices of food and
6 grocery products sold at nearby competing supermarkets.

7
8 77. Retail stores other than supermarkets, such as convenience stores, specialty
9 food stores, limited assortment stores, discounters, and club stores, may also sell food and
10 grocery products, but these retail stores do not offer a supermarket's distinct set of products
11 and services that provide consumers with the convenience of one-stop shopping for food and
12 grocery products. Consumers shopping for food and grocery products at supermarkets are
13 not likely to shop at other types of stores in response to a small but significant price increase
14 by supermarkets.

15
16 78. There are significant differences between the markets for general retailers and
17 supermarkets in product scope, target audience, pricing strategy, competition, and market
18 dynamics:

19 (a) Product Scope: General Retailers offer a vast array of goods beyond groceries,
20 including clothing, electronics, furniture, home furnishings, toys and more. Supermarkets
21 focus primarily on food and beverage products, including fresh produce, packaged items,
22 dairy, baked goods, and household essentials.

23
24 (b) Target Audience: General Retailers cater to a broader and more diverse
25 demographic. Supermarkets target households seeking groceries and everyday essentials.
26 Their customer base prioritizes factors like price, quality, and variety within the food and
27 beverage category.

1 (c) Pricing Strategy: General Retailers employ a mix of pricing strategies
2 depending on the product category and brand. They often utilize loss leaders, discounts, and
3 bundled deals to attract customers. Supermarkets generally rely on competitive pricing for
4 national brands and emphasize private label offerings with lower margins. They prioritize
5 value and everyday affordability for groceries.

6 (d) Competition: General Retailers face intense competition from other big-box
7 chains, online retailers, and specialty stores. Supermarkets compete primarily with other
8 supermarket chains in their geographic area, and in limited fashion with convenience stores
9 and discount grocers.

10 (e) Market Dynamics: Supermarkets are more insulated from economic
11 fluctuations as food remains an essential purchase. However, they are sensitive to agricultural
12 commodity prices.

13 Relevant Geographic Markets

14
15
16 79. The entire United States is a relevant geographic market for purposes of this
17 action because supermarket chains, and these Defendants, compete among themselves for
18 groceries, goods and other supplies from national suppliers on a national basis. Supermarket
19 chains compete for suppliers and products on a national basis.

20
21 80. Although a relevant geographic market is the entire United States, smaller local
22 relevant geographic markets exist within individual states. Supermarket chains compete for
23 customers in local areas where their consumer customers are concentrated.

24
25 81. Supermarkets offer consumers convenience. Supermarkets compete locally for
26 customers as consumers typically do their grocery shopping at stores located close to where
27
28

1 they live or work. Consumers are further limited by the distance they travel to shop at a
2 supermarket.

3 82. In some areas, many residents lack cars and must travel to grocery stores by
4 walking or through public transit which prevents them from traveling outside the community
5 in which they work or live to shop at alternative grocery stores. As a result, the majority of
6 consumers' grocery shopping occurs at stores located very close to where they live or work.
7

8 83. Relevant geographic submarkets may include areas limited to properly defined
9 neighborhoods or city submarkets, and additional urban, suburban, exurban or rural markets
10 throughout the United States.

11 84. Food is one of humanity's few true necessities, making competition in the
12 grocery industry unique. Supermarkets give local residents access to vital grocery products,
13 and supermarkets often compete against each other to provide the best value and service to
14 customers and in offering good jobs to workers.
15

16 85. For many neighborhoods and consumers, the accessibility of supermarkets by
17 foot or by public transit is critical for the communities' health as a whole.

18 POTENTIAL ANTICOMPETITIVE EFFECTS OF THE ACQUISITION

19 86. The proposed acquisition of Albertsons by Kroger "may" eliminate Albertsons
20 as a substantial competitor in the national and local relevant markets and "may" reduce the
21 intensity of price competition both nationally and locally. Although Kroger has stated it
22 "may" pass consolidation savings on to customers, economic studies have shown that post-
23 merger prices do not decrease but rather increase between 3 and 7 percent.
24

25 87. Because of the essential and constant need for food, even a short-term
26 reduction in competition in the urban neighborhoods, especially those where Kroger and
27
28

1 Albertsons compete, can result in higher prices and reductions in quality that can significantly
2 harm consumers' pocketbooks and health.

3 88. As a result of this reduced competition, consumers likely "may" pay more for
4 their groceries, and enjoy fewer promotions, worse service, and fewer quality-improving
5 investments and innovation than they would otherwise.

6 89. The companies have contended that their newly combined power would not be
7 used to raise prices. Yet Kroger's CFO, Gary Millerchip, told shareholders in October:
8 "We've been very comfortable with our ability to pass on the increases we've seen at this
9 point. And we would expect that to continue to be the case."

10 90. Food is among the goods that have seen the highest, most sustained price hikes
11 over the past year. An average grocery trip costs 13% more than it did a year ago, with the
12 highest jumps impacting supermarket staples (milk and bread are up 15%, chicken is up 17%,
13 and eggs 31%). Kroger CEO Rodney McMullen has argued that "a little bit of inflation is
14 always good in our business" because "customers don't overly react to that." At the same
15 time, his counterpart at Albertsons, Vivek Sankaran, has said, "Businesses like ours have
16 done well when in periods where the inflation was 3% to 4%." Last year, he offered this
17 market prediction: "My sense is this inflation will just be passed through" to customers.

18 91. This acquisition "may" affect the stores' employees as well as consumer prices.
19 Local residents depend on employment by these companies. The reduced need for employees
20 and suppressed wages from reduced competition for labor by these employers following the
21 acquisition "may" constitute a significant competitive harm. Workers "may" experience
22 lower wage growth and worse working conditions than they would otherwise. Albertsons'
23 current contribution to the prevailing competitive dynamic among supermarkets is, as shown
24 by its market presence and the jobs it provides, critical.

1 92. If Albertsons is eliminated, Kroger “may” operate in a highly concentrated
2 market. As a consequence, the potential for effective collusion among the remaining grocery
3 supermarket chains may substantially increase while food quality and consumer choices may
4 be cut, and prices may rise.

5 93. If Albertsons is eliminated, Kroger’s actual and potential competition with
6 Albertsons itself is also eliminated and the benefits of that competition are extinguished.
7

8 94. Ultimately, Kroger’s proposed elimination of its rival competitor Albertsons
9 may, and probably will, result in significant and irreparable harm and inconvenience to
10 consumers, including the Plaintiffs, by propelling grocery prices higher, reducing consumer
11 choices and decreasing food quality.

12 95. Moreover, the payment by Albertsons of the Special Dividend affects
13 Albertsons’ ability to compete because the dividend strips Albertsons of nearly all its cash-
14 on-hand during an economic downturn when it “may” be difficult for the company to obtain
15 additional capital. Without cash, Albertsons cannot advertise, promote, increase services,
16 refurbish, or reorganize stores to make them more attractive to consumers. As a substitute for
17 credit, it would have to rely on higher prices to raise cash for reinvestment, thereby harming
18 consumers. It may have to close stores, leaving customers with fewer choices and, as a
19 result, higher prices, inferior selection and quality, or both.
20

21 96. The decrease in the number of major grocery retailers over the past several
22 years reflects a persistent and deliberate pattern of concentration and reduction of competition
23 in the U.S. grocery supermarket industry, a trend which the Supreme Court has said must be
24 arrested in its incipency.
25

26 97. The elimination of Albertsons by Kroger “may” result in the elimination of a
27 vibrant competitor and the creation of the largest grocery supermarket giant by revenue in the
28

1 United States with 36% of all U.S. sales nationally – and higher in local markets - in an
 2 already highly concentrated market. The resulting concentration of market share both
 3 nationally and locally is unacceptably high and “may” ineluctably lead to collusion.

4 98. Market concentration is one indicia of the level of competition in a market. The
 5 more concentrated a market, and the more an acquisition may increase concentration in a
 6 particular market, the more likely it is that that transaction may result in a meaningful
 7 lessening in competition.
 8

9 99. Kroger and Albertsons currently have extensive overlapping markets. If
 10 Albertsons is eliminated, this acquisition may likely eliminate the actual and potential
 11 competition between Kroger and Albertsons in these markets, significantly harming
 12 consumers in the process. In addition, the loss of Albertsons’ competition in these markets
 13 may increase the likelihood that the remaining grocery retailers “may” coordinate with one
 14 another to raise prices, reduce output and diminish the quality of their products, thereby
 15 lessening competition in these overlapping markets and potentially creating conflicts with
 16 Section 1 of the Sherman Act.
 17

18 MARKET CONCENTRATION

19 The Relevant Markets Are Highly Concentrated and the Proposed Elimination of Albertsons

20 May Result in Presumptively Unlawful Market Concentrations

21 100. **The National United States Market.** The decrease in the number of major
 22 supermarkets over the past several years reflects a persistent and deliberate pattern of
 23 concentration and reduction of competition in the U.S. grocery industry, a trend which the
 24 Supreme Court has said must be arrested in its incipency.
 25

26 101. The elimination of Albertsons by Kroger “may” result in the creation of the
 27 largest supermarket chain in the United States with over 36% of the total revenue in the
 28

1 national grocery market in an already highly concentrated market where the biggest single
2 supermarket share is already nearly 24% by revenue and the top 6 firms command nearly 66%
3 of the market.⁸ Such concentration of market share in 6 firms is unacceptably high, ineluctably
4 leading to collusion.

5 102. Pre-acquisition, in 2021 Kroger and Albertsons combined accounted for
6 37.12% of the total national sales of the top 6 grocery supermarket chains in the United
7 States.⁹

8 103. Post-acquisition, a combined Kroger and Albertsons will account for 56.37% of
9 the national sales of the top 6 grocery supermarket chains in the United States, based upon
10 2021 figures.¹⁰

11 104. And in 2022, according to the European Supermarket Magazine, Kroger had
12 35.8% and Albertsons had 18.7% of the total national sales of the top 6 grocery supermarkets
13 in the United States. Together, they accounted for 54.5% of the sales of the top six
14 supermarkets in the United States in 2022. Of the top four supermarkets in 2022, Kroger
15 accounted for 43.8% and Albertsons accounted for 22.9% and together they accounted for
16 66.77% of the sales of the top four supermarkets in the United States.

17 105. High market share and market concentration is an indication of an
18 anticompetitive market. The more concentrated a market, and the more a transaction may
19 increase concentration in a particular market, the more likely it is that a transaction may result
20 in a meaningful lessening in competition. The Herfindahl-Hirschman Index (HHI) is often
21 widely employed in competition analysis to measure market concentration. HHI is calculated
22
23
24
25

26 ⁸ Source: www.supermarketnews.com/retail-financial/top25-supermarket-operators-sales

27 ⁹ Source: Chart, supra, Rankings of Top U.S. Grocery Supermarket Operators, Annual Sales (Pre-Acquisition - 2021)

28 ¹⁰ Source: Chart, supra, Rankings of Top U.S. Grocery Supermarket Operators, Annual Sales (Post-Acquisition)

1 by summing the squared market shares of all firms in the given market which “gives
2 proportionately greater weight to the larger market shares.”¹¹

3 106. Analysis of market concentration “consider[s] both the post-merger level of the
4 HHI and the increase in the HHI resulting from the merger.”

5 107. Markets in which the HHI reaches 2,500 points are considered very highly
6 concentrated. Post-merger increases in HHI of more than 200 points are presumed
7 likely to enhance market power and to be anticompetitive. Therefore, an acquisition that
8 increases the HHI by more than 200 points will “establish the [Plaintiffs’] prima facie case
9 that a merger is anticompetitive.”¹²

10 108. The national supermarket grocery provider market is already concentrated.
11 After the acquisition of Kroger and Albertsons, using 2020 sales figures¹³, the HHI of the
12 national supermarket grocery provider market would increase by 585 HHI points (almost 3
13 times the benchmark for an anticompetitive increase) from 1397 to 1,982, a jump in
14 concentration which is “presumed likely to enhance market power.”¹⁴

15 109. A Kroger-Albertsons acquisition therefore will result in an increase in national
16 concentration levels that far exceed the upper redline threshold for anticompetitive national
17 market dominance and therefore is presumptively illegal.

18 110. **The Local and Regional Markets.** Defendants have supermarkets that
19 compete head-to-head in several local geographic markets where Plaintiffs shop, including
20 Seattle, WA; Reno, NV; Tucson, AZ; Colorado Springs, CO; Snoqualmie, WA; Dallas, TX
21 and Fairbanks, AK.

22
23
24
25
26 ¹¹ *St. Alphonsus Medical Center vs. St. Luke’s Health System Ltd.*, 778 F.3d 775, at 786 (2015).

27 ¹² *Id.* at 786.

28 ¹³ Figures source: Chart, Domestic Market Share of U.S. Grocery Supermarket Operators, *supra*, sourced from
www.supermarketnews.com/retail-financial/top-25-supermarket-operators-sales.

¹⁴ *St. Alphonsus Medical Center vs. St. Luke’s Health System Ltd.*, 778 F.3d 775, at 786 (2015).

111. The elimination of Albertsons in these local market areas may result in higher prices, less availability of products, and a clear elimination of consumer choice, as well as substantial increases in concentration.

112. If Albertsons is eliminated, market concentration in at least these local markets, as well as others, may, and most probably will, lead to adverse competitive effects, including increases in prices, reductions in service and loss of choice.

113. **Seattle, WA Market.** The following chart shows the distribution of 2023 market share in the Seattle-Tacoma-Bellevue Core Based Statistical Area¹⁵ (CBSA).

COMPANY	STORE NAME	MARKET SHARE
Fred Meyer Stores Inc.	Fred Meyer	18.35%
Safeway Inc.	Safeway	17.31%
Costco Wholesale Corp.	Costco Bus. Center; Costco	16.10%
The Kroger Co.	Quality Food Center	14.36%
Walmart Stores Inc.	Walmart; Walmart Supercenter	8.07%
H Mart Northwest	Campeon Mkt etc.	4.57%
Trader Joe's Co.	Trader Joe's	3.18%
WinCo Foods LLC	WinCo Foods	3.01%
Whole Foods Market Inc.	Whole Foods Market	2.54%
PCC Natural Markets	PCC Community Markets	2.06%
Target Corporation	CityTarget; Target; Target PF	1.82%
Albertsons LLC	Albertsons	1.78%
Grocery Outlet Holding Co	Grocery Outlet	1.42%
Metropolitan Market	Metropolitan Market	0.69%
Haggen Inc.	Haggen Northwest Fresh	0.55%
Defense Commissary Ag.	Ft Lewis; McChord AFB	0.51%
Uwajimaya Inc.	Uwajimaya	0.47%
Town & Country Mkt Inc.	Ballard Market etc.	0.44%

¹⁵ The Core Based Statistical Area (CBSA) is an area that is based on the major city or cities within that area. CBSAs are generally metropolitan (Metro) or micropolitan (Micro) statistical areas containing a substantial population nucleus, together with adjacent communities that have a high degree of social and economic integration with that core. Metropolitan statistical areas may comprise one or more entire counties. Market share calculations are based upon the total dollars spent at all supermarkets, mass merchandisers and warehouse clubs within the specified market area during the current identified. Figures for mass merchandisers and warehouse clubs exclude non-grocery sales. It should be noted that the CBSA figures include the big-box general retail stores of Walmart, Target, Sam's Club and Costco which Plaintiffs contend to be in a separate market.

Saar's Inc.	Saar's Mkt Place; Super Saver	0.43%
Dollar Tree Stores Inc.	Dollar Tree	0.41%
Others		1.93%

114. In the Seattle CBSA, the 2023 market data (which also includes the big-box general retail stores of Walmart, Target, Sam's Club and Costco which Plaintiffs contend to be in a separate market), shows Defendant Kroger (Fred Meyer, Metro and QFC stores) with 33.40% market share and Albertsons (Safeway, Haggen) with 19.64%.¹⁶ The Defendants' post acquisition combined market share would total 53.04%, a local market concentration that is much higher than percentage totals that have been held in the past by the Supreme Court to constitute a violation of Section 7 of the Clayton Act.

115. In addition, the data shows that the HHI in the Seattle-Tacoma-Bellevue CBSA will exceed the thresholds specified in the U.S. Horizontal Merger Guidelines of the U.S. Department of Justice and "may" be presumptively illegal. Before the elimination of Albertsons, the HHI index for the Seattle CBSA was 1231. After Albertsons is eliminated, however, the HHI will increase by 1,967 points to 3,198, an increase and a concentration that is clearly "presumed likely to enhance market power" and is considered highly concentrated under the Department of Justice's Horizontal Merger Guidelines¹⁷ – even including the general retailers Costco and Walmart.

116. Plaintiff Stensrud who lives in the Seattle area has regularly shopped and "may" continue to shop at the Albertsons owned Safeway stores in this local geographic area, as well as at the Kroger owned QFC and Fred Meyers stores, all of which are within 5 miles of his home and "may" be directly affected by the acquisition should it consummated. Plaintiff Michael Malaney regularly visits his daughter who lives in Kirkland, WA, a suburb of Seattle,

¹⁶ Chain Store Guide, Grocery Industry Market Share Report, 2023.

¹⁷ Calculations based upon figures provided by Chain Store Guide, Grocery Industry Market Share Report, 2023.

1 three or four times a year and when he is there he shops and “may” continue to shop at the
 2 Safeway, Fred Meyer and QFC stores near her, all of which are within 1 to 5 miles of her
 3 home.

4 117. **Snoqualmie, WA Market.** Snoqualmie is a small community, a “section of
 5 the country”, located approximately 30 miles east of Seattle and should be viewed as a sub-
 6 market of the Seattle-Tacoma-Bellevue CBSA. In Snoqualmie there are 6 grocery markets of
 7 which 2 are operated by Safeway (Albertsons) and 1 is operated by QFC (Kroger). The
 8 remaining are smaller groceries: Crescent Market, Snoqualmie Market and Dollar Tree. The
 9 purchase of Albertsons by Kroger would give Kroger 50% of the major supermarket locations
 10 in Snoqualmie out of the 6 groceries that operate there.

12 118. Plaintiff Don Fry regularly shops and “may” continue to shop at the Safeway
 13 store in Snoqualmie when he often visits his son there because the store is located within 1
 14 mile of his son’s home. He “may” also occasionally shop at the QFC store in Snoqualmie.

16 119. **Dallas, TX Market.** The market share data for the Dallas-Fort Worth-
 17 Arlington CBSA grocery market for 2023 (which also includes the big-box general retail
 18 stores of Walmart, Target, Sam’s Club and Costco which Plaintiffs contend to be in a separate
 19 market), shows Kroger with 16.57% of the market, with 95 stores, and Albertsons (Tom
 20 Thumb and Albertsons) with 10.66%, with 94 stores.¹⁸ The combined post-acquisition market
 21 share of Kroger and Albertsons would total 27.23%. A local market concentration in this
 22 amount is much higher than percentages that have been held in the past by the Supreme Court
 23 to constitute a violation of Section 7 of the Clayton Act.

25 120. In addition, the data shows that the HHI in the Dallas-Fort Worth-Arlington
 26 CBSA will exceed the thresholds specified in the U.S. Horizontal Merger Guidelines of the
 27

28 ¹⁸ Source: Chain Store Guide, grocery sales only - pharmacy and general merchandise sales excluded.

1 U.S. Department of Justice and “may” be presumptively illegal. Before the elimination of
 2 Albertsons, the HHI index for the Dallas-Fort Worth-Arlington CBSA was 1300. After
 3 Albertsons is eliminated, however, the HHI will increase by 403 points to 1703, an increase
 4 that is double the increase that is “presumed likely to enhance market power” and is
 5 considered concentrated under the Department of Justice’s Horizontal Merger Guidelines¹⁹ –
 6 even though it also includes the general retailers Target, Costco, Sam’s Club and Walmart.
 7

8 121. Plaintiff Valarie Jolly regularly shops and “may” continue to shop at the
 9 Albertsons and the Kroger stores where she works near the Dallas Fort Worth Airport in the
 10 Dallas-Fort Worth-Arlington CBSA and “may” be directly affected by the acquisition should
 11 it consummated.

12 122. **Colorado Springs, CO Market.** The 2023 supermarket grocery store market
 13 share data for the Colorado Springs, CO, Core Based Statistical Area (CBSA) (which also
 14 includes the big-box general retail stores of Walmart, Target, Sam’s Club and Costco which
 15 Plaintiffs contend to be in a separate market), shows Defendant Kroger (City Market; King
 16 Soopers; King Soopers Marketplace) with 20.9% and Albertsons (Safeway) with 18.15%.²⁰
 17 The Defendants’ post acquisition combined market share would total 39.05%, a local market
 18 concentration that is much higher than percentage totals that have been held in the past by the
 19 Supreme Court to constitute a violation of Section 7 of the Clayton Act.
 20

21 123. In addition, the data shows that the HHI in the Colorado Springs, CO, CBSA
 22 will exceed the thresholds specified in the U.S. Horizontal Merger Guidelines of the U.S.
 23 Department of Justice and “may” be presumptively illegal. Before the elimination of
 24 Albertsons, the HHI index for the Colorado Springs, CO, CBSA was 1616. After Albertsons
 25 is eliminated, however, the HHI will increase by 759 points to 2375, an increase that is almost
 26

27 ¹⁹ Calculations based upon figures provided by Chain Store Guide, Grocery Industry Market Share Report, 2023.

28 ²⁰ Chain Store Guide, Grocery Industry Market Share Report, 2023.

quadruple the increase that is “presumed likely to enhance market power” and is considered concentrated under the Department of Justice’s Horizontal Merger Guidelines²¹ – even though it also includes the general retailers Target, Costco, Sam’s Club and Walmart.

124. Plaintiff Gardner lives within 10 miles of the nearest King Soopers (Kroger) where she regularly shops and “may” continue to shop.

125. **Fairbanks, AK Market.** In the State of Alaska, Kroger and Albertsons (Safeway and Carrs stores) are the primary competitors selling groceries and household goods and are the state’s third and fourth largest employers measured by number of employees. Other smaller groceries lack sufficient scale to compete with Kroger and Albertsons. Alaska State Representatives Spohnholz and Fields have written that “The short-term benefits – to a tiny number of executives and the largest corporate shareholders – from consolidation of the nation’s leading grocers do not outweigh the massive costs to consumers and front-line workers.”²²

126. Safeway and Fred Meyer are the only major grocery supermarkets in Fairbanks.

127. The 2023 supermarket grocery store market share data for the Fairbanks, AK Core Based Statistical Area (CBSA) (which also includes the big-box general retail stores of Walmart and Costco and the Fort Lee and Eielson Commissaries which Plaintiffs contend to be in a separate market), shows Defendant Kroger (Fred Meyer) with 30.1% and Albertsons (Safeway) with 17.62%.²³ The Defendants’ post acquisition combined market share would total 47.72%, a local market concentration that is well in excess of percentage totals that have

²¹ Calculations based upon figures provided by Chain Store Guide, Grocery Industry Market Share Report, 2023.

²² Letter from Alaska State Representatives, Spohnholz and Fields, to Chairwoman Lina Kahn, Federal Trade Commission, dated October 21, 2022.

²³ Chain Store Guide, Grocery Industry Market Share Report, 2023.

1 been held by the Supreme Court in the past to constitute a violation of Section 7 of the
2 Clayton Act.²⁴

3 128. In addition, the data shows that the HHI in the Fairbanks, AK, CBSA will
4 exceed the thresholds specified in the U.S. Horizontal Merger Guidelines of the U.S.
5 Department of Justice and “may” be presumptively illegal. Before the elimination of
6 Albertsons, the HHI index for the Fairbanks, AK, CBSA was 2193. After Albertsons is
7 eliminated, however, the HHI will increase by 1061 points to 3254, an increase that is more
8 than five times the increase that is “presumed likely to enhance market power” and is
9 considered extremely concentrated under the Department of Justice’s Horizontal Merger
10 Guidelines – even though it also includes the general retailers Costco and Walmart and
11 military commissaries.
12

13 129. Plaintiff Pamela Ward regularly shops and “may” continue to shop at both the
14 Safeway and the Fred Meyer stores in Fairbanks when she regularly travels there to visit her
15 family.
16

17 130. According to Alaska State Representatives Spohnholz and Fields: “This
18 merger would reduce market competition and result in further price inflation in food and
19 household necessities.”²⁵
20

21 131. **Tucson, AZ Market.** Albertsons operates 134 stores in Arizona, compared
22 with 124 for Kroger. The combined companies would command a 44% market share of the
23 Arizona grocery market according to a 2019 analysis by Chain Store Guide.

24 132. In the Tucson Core Based Statistical Area (CBSA) (which also includes the
25 big-box general retail stores of Walmart, Costco, Target, and Sam’s Club which Plaintiffs
26

27 ²⁴ Calculations based upon figures provided by Chain Store Guide, Grocery Industry Market Share Report, 2023.

28 ²⁵ Letter from Alaska State Representatives, Spohnholz and Fields, to Chairwoman Lina Kahn, Federal Trade Commission, dated October 21, 2022.

1 contend to be in a separate market), Albertsons operates 6 Albertsons supermarkets and 18
 2 Safeway supermarkets. Kroger operates 18 Fry's supermarkets in Tucson. The next biggest
 3 dedicated grocery chain operator in Tucson is Basha's with 14 stores. The purchase of
 4 Albertsons by Kroger would give Kroger 42 supermarket locations in Tucson.

5 133. The 2023 supermarket grocery store market share data for the Tucson, AZ,
 6 CBSA shows Defendant Kroger's stores with 21.71% and Albertsons (Safeway and
 7 Albertsons) stores with 18.83%.²⁶ The Defendants' post acquisition combined market share
 8 would total 40.54%, a local market concentration that is well in excess of percentage totals
 9 that have been held by the Supreme Court in the past to constitute a violation of Section 7 of
 10 the Clayton Act.

11 134. In addition, the data shows that the HHI in the Tucson, AZ, CBSA will exceed
 12 the thresholds specified in the U.S. Horizontal Merger Guidelines of the U.S. Department of
 13 Justice and "may" be presumptively illegal. Before the elimination of Albertsons, the HHI
 14 index for the Fairbanks, AK, CBSA was 1338. After Albertsons is eliminated, however, the
 15 HHI will increase by 951 points to 2289, an increase that is almost five times the increase that
 16 is "presumed likely to enhance market power" and is considered concentrated under the
 17 Department of Justice's Horizontal Merger Guidelines²⁷ – even though it also includes the
 18 general retailers Costco and Walmart and military commissaries.

19 135. Plaintiff Don Fry lives in Tucson and has shopped and "may" continue to shop
 20 at the Kroger and Albertsons owned stores in this local geographic area.

21 136. **Reno, NV Market.** The 2023 supermarket grocery store market share data for
 22 Reno, NV, Core Based Statistical Area (CBSA) (which also includes the big-box general retail
 23 stores of Walmart, Costco, Target, and Sam's Club which Plaintiffs contend are in a separate
 24

25 ²⁶ Chain Store Guide, Grocery Industry Market Share Report, 2023.

26 ²⁷ Calculations based upon figures provided by Chain Store Guide, Grocery Industry Market Share Report, 2023.

1 market), shows Defendant Kroger (Smith's) stores with 8.15% and Albertsons (Safeway)
 2 stores with 7.08%.²⁸ The Defendants' post acquisition combined market share would total
 3 15.23%, a local market concentration that is in excess of percentage totals that have been held
 4 by the Supreme Court in the past to constitute a violation of Section 7 of the Clayton Act.

5 137. Both Plaintiffs Len Marazzo and Jose Brito live in Reno and regularly shop at
 6 the Defendants' stores. Both "may" continue to shop at the Defendants' Safeway and Smith's
 7 stores.
 8

9 138. **The Northeastern United States Market.** According to the heatmap
 10 demographic analysis made by Maptitude Mapping Software²⁹, Defendant Kroger's stores are
 11 generally located in areas with a lower measure of expenditure on groceries. Generally, across
 12 the U.S., the average expenditure for groceries around Kroger-owned locations is \$6,755.46
 13 while the average expenditure for groceries around Albertsons-owned locations is \$7,028.07.
 14 A conclusion to be drawn is that people who live close to Albertsons locations spend more on
 15 groceries than people who live close to Kroger locations, but, according to Maptitude, it is
 16 also true that spending on groceries near Albertsons and Kroger locations is somewhat higher
 17 than the national average.
 18

19 139. Apparently in response to these demographics, Kroger has proposed to acquire
 20 the Albertsons stores located in markets where Kroger does not currently compete with
 21 Albertsons and has NO stores. One such market area is the Northeastern United States where
 22 Albertsons owns and operates 225 stores in Maine, New Hampshire, Vermont, New York,
 23 Massachusetts, Connecticut, Rhode Island and Pennsylvania. This whole-cloth purchase of
 24 225 stores in a market where Kroger has not previously competed is further evidence of
 25 anticompetitive conduct in violation of Section 7 which values entry into a market by
 26
 27

28 ²⁸ Chain Store Guide, Grocery Industry Market Share Report, 2023.

²⁹ <https://www.caliper.com/mapitude/blog/albertsons-and-kroger-geographic-market-analysis/default.htm>

1 competition rather than by acquisition. The Defendants are, in effect, buying and selling
2 markets instead of competing for them. See *Falstaff, supra*.

3 140. Plaintiffs Gary Talewsky, Harry Garavanian, Gabe Garavanian and Bill
4 Rubinsohn live in the Northeast United States where Kroger has proposed its wholesale
5 purchase of Albertsons stores. Harry Garavanian lives in Nashua, New Hampshire and
6 regularly shops and “may” continue to shop at the Shaw’s store (Albertsons) there. Plaintiff
7 Bill Rubinsohn lives in Philadelphia, Pennsylvania and regularly shops at the Acme
8 (Albertsons) supermarket that is .5 miles from his home and at the Acme that is 3 miles from
9 his home. He plans to continue to shop at these stores. Plaintiff Gabriel Garavanian lives in
10 Tyngsboro, Massachusetts and regularly shops and “may” continue to shop at the Shaw’s
11 market (Albertsons) in close-by Nashua, NH. And Plaintiff Gary Talewsky lives in Foxboro,
12 Massachusetts during the summer months and regularly shops and “may” continue to shop at
13 the Shaw’s store (Albertsons) when he is there. Shaw’s controls 60% of the market there.
14
15

16 STANDING

17 141. Plaintiffs have standing to bring this action under Section 7 of the Clayton Act.

18 142. For standing in a Section 7 case a plaintiff need only show that the effect of the
19 acquisition “may be substantially to lessen competition ... in any line of commerce ... *in any*
20 *section of the country.*”³⁰

21 143. By prohibiting acquisitions that may substantially lessen competition, Congress
22 “indicate[d] that its concern was with probabilities, not certainties,” and courts are to find
23 violations where “the probable future effect of the merger” is to lessen competition³¹ and
24 Section 16 of the Clayton Act authorizes private plaintiffs to obtain injunctive relief for any
25
26

27 ³⁰ 15 U.S.C. § 18.

28 ³¹ *Brown Shoe, supra* at 370 U.S. at 323.

1 “threatened loss or damage” resulting from a violation of the antitrust laws³² “even though the
2 plaintiff has not yet suffered actual injury.”³³ A private plaintiff “need only demonstrate a
3 significant threat of injury from an impending violation of the antitrust laws.”³⁴

4 144. The threatened injury to Plaintiffs and all grocery store consumers throughout
5 the United States in this case is that prices “may” increase to Plaintiffs and consumers if this
6 acquisition is consummated. Studies have shown that prices after mergers normally increase
7 by 12-13% and the quality of services is diminished. This is the very “injury of the type the
8 antitrust laws were intended to prevent and that flows from that which makes defendants’ acts
9 unlawful”³⁵ since “‘antitrust injury’ ... means injury from higher prices or lower output, the
10 principal vices proscribed by the antitrust laws.”³⁶

11 145. In addition, Plaintiffs in this case seek to serve “the high purpose of enforcing
12 the antitrust laws”³⁷ since Section 16 was intended to “encourage vigorous private litigation
13 against anticompetitive mergers;” “was an integral part of the congressional plan for
14 protecting competition;” and “fits well in a statutory scheme that ... subjects mergers to
15 searching scrutiny”.³⁸

16 146. The effect on Plaintiffs is in this case probable, not speculative. Since Plaintiffs
17 are direct consumers of Defendants’ supermarket services and since Plaintiffs purchase the
18 goods sold by Defendants at their supermarkets, Plaintiffs allege that competition might
19 substantially be lessened for these Plaintiffs and other consumers in the local markets where
20 Plaintiffs shop. The potential injury to Plaintiffs in this case, the lessening of competition, is
21 ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and
22
23
24

25 ³² 15 U.S.C. § 26.

26 ³³ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), at 130.

27 ³⁴ *Id.*

28 ³⁵ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

³⁶ *Ball Memorial Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986).

³⁷ *Zenith*, *supra* at 395 U.S. at 130.

³⁸ *California v. American Stores*, 495 U.S. 271 (1990), at 284-85

1 redressable by a favorable ruling.”³⁹ The injury is imminent and “there is a ‘substantial risk’
 2 that the harm will occur”⁴⁰ if the acquisition is permitted to go forward since this acquisition
 3 “may” eliminate a viable competitor from the marketplace where Plaintiffs are consumers of
 4 the Defendants’ goods.

5 147. Plaintiff Michael Malaney: Plaintiff Malaney lives in Grandville, Michigan.
 6 There are no Kroger or Albertsons stores in the Grandville area, but he regularly visits his
 7 daughter who lives in Kirkland, WA, a suburb of Seattle, three or four times a year and when
 8 he is there he shops and may continue to shop at the Safeway, Fred Meyer and QFC stores
 9 near her, all of which are within 1 to 5 miles of her home.

10 148. Plaintiff Timothy Nieboer: Plaintiff Nieboer lives in Clarkston, Michigan,
 11 which is a near suburb of Detroit. He regularly shops and “may” continue to shop at the
 12 Kroger supermarkets near his home. There are four Kroger supermarkets within six miles of
 13 his home. The other supermarkets nearby are Neiman’s Family Market (2.5 miles), Aldi (6.7
 14 miles), Meijer (7.2 miles), Bueches Food World (7.3 miles) and Kroger Marketplace (8.8
 15 miles). These stores are not options for him because Neiman’s is very expensive and because
 16 Aldi and Meijer, though less expensive, are farther away and inconvenient during rush hours.

17 149. Plaintiff Jose Brito: Plaintiff Brito lives in Reno, Nevada. He regularly shops
 18 and “may” continue to shop at the Safeway (Albertsons) and Smith’s (Kroger) supermarkets
 19 near his home. The other supermarkets nearby are Raley’s and Save Mart; however, Raley’s
 20 is not an option because it is too expensive.

21 150. Plaintiff Len Marazzo: Plaintiff Marazzo lives in Reno, Nevada. He regularly
 22 shops and “may” continue to shop at the Safeway (Albertsons) and Smith’s (Kroger)
 23

24
 25
 26
 27
 28 ³⁹ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013)

⁴⁰ *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) quoting *Clapper*, *supra* at 568 U.S. at 415 n.5.

1 supermarkets near his home. The other option is Sak n' Save, but it is not as good an option
2 since it is four miles away.

3 151. Plaintiff Don Freeland: Plaintiff Freeland lives in Thousand Palms, California.
4 He regularly shops and "may" continue to shop at Albertsons, Vons (Albertsons), Ralph's
5 (Kroger) and Food 4 Less (Kroger). Other local stores are Stater Bros. Supermarket and
6 certain smaller stores and Mexican oriented chains that are not realistic options.
7

8 152. Plaintiff Christine Whalen: Plaintiff Whalen lives in New Orleans, Louisiana.
9 There are no Kroger or Albertsons supermarkets in her area in New Orleans, however she
10 "may" occasionally shop at the Albertsons supermarket in Baton rouge when she is there to
11 visit.

12 153. Plaintiff Kathy Arcell: Plaintiff Arcell used to shop at the Albertsons store in
13 New Orleans, but it was closed many years ago. She now shops at Winn Dixie and Rouses.
14 Plaintiff shops at Kroger in Atlanta when she visits family there.
15

16 154. Plaintiff Carolyn Fjord: Plaintiff Fjord lives in Winters, California and owns a
17 vacation home in Port Huron, Michigan. She shops and "may" continue to shop at
18 Albertsons' Safeways in Vacaville and in Davis once or twice a week. She and her husband
19 travel to Port Huron most every summer and when there regularly shop at the Kroger
20 supermarket there. She has regularly shopped at Kroger in Port Huron for over 30 years. She
21 "may" continue to shop at Kroger when she travels to Port Huron during summer vacations.
22 She also regularly shops and "may" continue to shop at Kroger's King Super in Loveland,
23 Colorado when she regularly visits her son there.
24

25 155. Plaintiff Rosemary D'Augusta: Plaintiff D'Augusta lives in Millbrae,
26 California and regularly shops and "may" continue to shop at the Safeway (Albertsons) in
27 Millbrae. Safeway is the major supermarket in her area and is within one mile of her home.
28

1 There are also Trader Joe's (within 1 mile) and Lunardi's (2 miles) from her home. Lunardi's
2 is not a reasonable option because it is not a major supermarket. It offers some products that
3 you would find in Safeway but at higher prices. Trader Joe's is not a major supermarket and
4 has only a limited supply of food offerings to the public. Plaintiff shops at Safeway regularly,
5 almost daily. It is convenient, and provides full service, one-stop shopping at reasonable
6 prices. The Lucky supermarket in her area recently closed.
7

8 156. Plaintiff Deborah Pulfer: Plaintiff Pulfer lives in Sidney, Ohio. Plaintiff
9 regularly shops and "may" continue to shop at the Kroger supermarket that is 4 miles from her
10 home in Sidney. The other options are the Walmart store which is 4.5 miles from her home or
11 the Sidney Foodtown which is 2.8 miles from her home. Although the Foodtown is closer
12 than the Kroger supermarket, it is not a reasonable option because its prices are higher, and it
13 is smaller and does not offer the selection of products that the Kroger offers. Plaintiff also
14 regularly shops at the Safeway (Albertsons) in Estes Park, Colorado where she vacations for
15 two months every summer. Estes Park is a small community of 5-6 thousand year-round
16 residents, and there is not another major grocery nearby. The closest would be in Loveland,
17 Colorado, 30 miles away. There are no reasonable options when in Estes Park for the
18 summer.
19

20 157. Plaintiff Bill Rubinsohn: Plaintiff Rubinsohn lives in Philadelphia,
21 Pennsylvania and regularly shops at the Acme (Albertsons) supermarket that is .5 miles from
22 his home and at the Acme that is 3 miles from his home. He plans to continue to shop at these
23 stores. Other stores close by his home in Philadelphia are Shoprite, Whole Foods, Shop and
24 Bag and Giant, all within 3 miles. Plaintiff also regularly shops at the Kroger store in
25 Lansing, Michigan and at the Kroger store in Holt, Michigan when he travels to Michigan four
26 to five times a year.
27
28

1 158. Plaintiff Jocelyn Gardner: Plaintiff Gardner lives in Colorado Springs,
2 Colorado and lives 10 miles from the nearest King Soopers (Kroger) where she regularly
3 shops and “may” continue to shop. There are King Soopers in town, as well as Safeway stores
4 (Albertsons), Sprouts Farmers Market, Whole Foods, Natural Grocers, Trader Joe’s and Save
5 A Lot. The Safeway stores are not a reasonable option because the Safeway stores are more
6 expensive than the King Soopers; but if Kroger is permitted to purchase the Safeway stores in
7 the area, the King Soopers prices may rise to the level of the Safeway stores’ pricing.
8

9 159. Plaintiff Jan Marie Brown: Plaintiff Brown lives in Carson City, Nevada, and
10 regularly shops and “may” continue to shop at the Smith’s (Kroger) supermarket there that is
11 close to her house approximately one mile away. Other grocery stores in Carson City are Save
12 Mart, Food Maxx, Trader Joe’s, and Raley’s. These stores are not an option because they are
13 farther away. There is a Walmart close by, but its grocery department is poorly managed and
14 is inferior in quality to the Smith’s. In addition, Plaintiff’s husband commutes to Truckee,
15 California, five days a week and occasionally shops at the Safeway (Albertsons) there. In
16 Truckee there is also a Grocery Outlet and a Save Mart.
17

18 160. Plaintiff Don Fry: Plaintiff Fry lives in Tucson, Arizona and regularly shops
19 and “may” continue to shop at Safeway (Albertsons), which is within 4 miles of his home, and
20 he sometimes shops at the Fry’s market (Kroger) that is 6 miles away. There are two more
21 Safeway stores within 6 miles of his home in either direction. There are also 2 additional
22 Fry’s (Kroger) markets within 6 to 8 miles and there are 2 Albertsons within 6 miles of his
23 home. In addition, Plaintiff often visits his son in Snoqualmie, Washington. When visiting
24 his son, he regularly uses the Safeway (Albertsons) located within 1 mile of his son’s home
25 and occasionally “may” shop at the Fred Meyer (Kroger) store located there as well, but
26 farther away.
27
28

1 161. Plaintiff Clyde Stensrud: Plaintiff Stensrud lives in Kirkland, Washington and
2 regularly shops and “may” continue to shop at the Safeway (Albertsons), the QFC (Kroger)
3 and the Fred Meyer (Kroger) stores in the area. All of these stores at within 5 miles of his
4 home. There are no adequate substitutes in his mind to these supermarkets.

5 162. Plaintiff Pamela Faust: Plaintiff Faust lives in Loveland, Ohio and regularly
6 shops and “may” continue to shop at the Kroger store located within 2 miles from her home.
7 A potential option is the Meijer store, but it is located over 5 miles from her home and so is
8 not as convenient. There is also an Aldi market in Loveland which is 6 miles from her home
9 but where she would only shop if she were in the area. Plaintiff regularly vacations in Salt
10 Lake City and when there regularly shops at Smith’s (Kroger) which is located 5 miles from
11 where she stays. She “may” continue to shop at Smith’s when in Salt Lake City.

12 163. Plaintiff Pamela Ward: Plaintiff Ward lives in Holmes Beach, Florida, where
13 there are currently no Albertsons or Kroger stores. However, Plaintiff regularly visits family
14 in Fairbanks, Alaska. There are Safeway stores (Albertsons) and Fred Meyer stores (Kroger)
15 in Fairbanks. When there Plaintiff regularly shops at both the Safeway and the Fred Meyer
16 stores. If these stores were to merge, it would eliminate all of the competition there and would
17 be catastrophic. Plaintiff also travels to Dallas, TX to visit her son who lives there and when
18 she is in Dallas she shops at Tom Thumb, Albertsons and the Kroger there.

19 164. Plaintiff Sandy Russell: Plaintiff Russell lives in Waco, Texas. It is a rural area
20 that has no Albertsons or Kroger. The closest Albertsons is 30 miles away where she “may”
21 shop occasionally. There is a United Super (Albertsons) 25 miles away where I may shop in
22 the future when I am in that area. I do often shop at Albertsons and Tom Thumb when I
23 regularly vacation in Gainesville.

1 165. Plaintiff Valarie Jolly: Plaintiff Jolly lives in Mabank, Texas, but since there
2 are no good shopping opportunities near her home she shops where she works, near the
3 Dallas/Fort Worth airport, where there is an Albertsons, a Kroger, Tom Thumb, Target,
4 Central Market, Market Street and other Big Box stores. Plaintiff regularly shops and “may”
5 continue to shop at the Albertsons and the Kroger stores near the Dallas Fort Worth Airport.
6

7 166. Plaintiff Brenda Davis: Plaintiff Davis lives in Forney, Texas and regularly
8 shops and “may” continue to shop at the Kroger store located at 500 Marketplace Drive in
9 Forney, Texas. Forney is a relatively small city located in Kaufman County, approximately
10 21 miles east of Dallas and is one of the fastest growing communities in Texas. The Kroger
11 store where she shops is approximately 3.5 miles from her home. Although there is a Walmart
12 store in Forney, it is not an option because Plaintiff prefers the produce and meats at the
13 Kroger market and enjoys the weekly specials at the Kroger store and it takes too long to shop
14 at the crowded Walmart store. The Aldi and Brookshires stores also located in Forney are not
15 an option because they have less selection and product.
16

17 167. Plaintiff Gabriel Garavanian: Plaintiff Garavanian lives in Tyngsboro,
18 Massachusetts and regularly shops and “may” continue to shop at the Shaw’s market
19 (Albertsons) in close-by Nashua, NH which is 3 miles from his home. Plaintiff also lives part
20 of the year in Myrtle Beach, South Carolina and regularly shops and “may” continue to shop
21 at the Kroger store there.
22

23 168. Plaintiff Harry Garavanian: Plaintiff Garavanian lives in Nashua, New
24 Hampshire and regularly shops and “may” continue to shop at the Shaw’s store (Albertsons)
25 there.
26

27 169. Plaintiff Gary Talewsky: Plaintiff Talewsky lives in Foxboro, Massachusetts
28 for 3 to 4 months during the summer and regularly shops and “may” continue to shop at the

1 Shaw's store (Albertsons) when he is there. There are several Shaw's stores in and around
2 Foxboro and Shaw's controls 60% of the market there. Other stores that carry some grocery
3 items include Stop & Shop and the big box store, Costco, but neither are viable options to the
4 selection and quality of the Shaw's stores.

5 170. Plaintiff Lisa McCarthy: Plaintiff McCarthy lives in Naples, Florida and
6 regularly shops there. Plaintiff formerly shopped at Albertsons, but the stores were closed
7 there. There are currently no Kroger or Albertsons stores in Naples or Collier County. She
8 primarily shops at Publix which is 3 miles from her home. She also shops at The Fresh
9 Market, Wynn's and Trader Joe's.

10 171. The relevant product market in this case is the retail sale of food and
11 other grocery products in supermarkets. Plaintiffs buy food and other products from
12 Defendants stores. As a result, Plaintiffs participate directly in the market for retail sales in
13 supermarkets. Defendants seek to attract the business of Plaintiffs for their supermarket sales.

14 172. Defendants make their money from the sales they make to Plaintiffs and other
15 consumers of grocery products. Defendants' dominance in the grocery sales market gives
16 them the power to control the price goods that they "may" charge to Plaintiffs and other
17 consumers. The revenue Defendants generate comes from the sale of groceries and other
18 products to Plaintiffs and other consumers.

19 173. Prices to Plaintiffs and consumers may rise and the quality of services may
20 decrease if competition for grocery sales is eliminated by this acquisition. This fact is borne
21 out by both the authorities and experience.

22 174. For example, the US Department of Justice's (DOJ) Antitrust Division has
23 stated that "mergers can lead to higher prices and reduced innovation." The DOJ also notes
24 that "mergers that eliminate significant competition are more likely to harm consumers."

1 175. The Federal Trade Commission (FTC) also has a number of concerns about
2 mergers, including their potential for higher prices. The FTC has stated that "mergers can
3 reduce competition and lead to higher prices, less innovation, and lower quality goods and
4 services."

5 176. In addition to the DOJ and FTC, the European Commission has stated that
6 "mergers can lead to higher prices for consumers, less innovation, and lower quality goods and
7 services."
8

9 177. There is a significant body of economic research that supports the view that
10 acquisitions or mergers may lead to higher prices. For example, a study by the American
11 Economic Association found that "mergers between two firms in the same industry lead to an
12 average price increase of 4%."

13 178. Overall, there is a strong consensus among authorities and economists that
14 acquisitions and mergers can lead to higher prices. This is because acquisitions and mergers
15 reduce the number of competitors in a market, which gives firms more market power and
16 allows them to raise prices.
17

18 179. In addition, there are specific examples of mergers that have led to higher
19 prices:

20 (a) The merger of Anheuser-Busch and InBev in 2008 led to higher beer
21 prices in the United States.
22

23 (b) The merger of Dow Chemical and DuPont in 2017 led to higher prices
24 for pesticides and other agricultural chemicals.

25 (c) The merger of AT&T and Time Warner in 2018 led to higher prices for
26 cable TV and broadband services.
27
28

180. The Plaintiffs' threatened injury is therefore both particularized and concrete and imminent. Plaintiffs have been threatened with injury by reason of the proposed acquisition which would eliminate the competition of a viable competitor in the market, and which may result in higher prices, less quality of goods and services and less variety and innovation in the grocery market.

IRREPARABLE INJURY

181. The lessening of competition constitutes irreparable harm as Justice O'Connor explicitly and unequivocally stated: “. . . lessening of competition ‘is precisely the kind of irreparable injury that injunctive relief under Section 16 of the Clayton Act was intended to prevent’”. *California v. American Stores*, Justice O'Connor, 492 U.S. 1301, 1304 (1989).⁴¹

182. In addition, Kroger’s elimination of Albertsons will be virtually certain to cause substantial irreparable injury to Plaintiffs and to all consumers for grocery and other retail products in the relevant geographic and product markets in that, among other reasons, Albertsons, and the consumer choices that go with it, “may” be gone, and once gone, cannot be reconstituted.

183. Plaintiffs and customers are threatened with the loss of (1) the distinctive services offered by Albertsons; (2) a reduction in customer choice; and (3) a reduction and curtailment of competition, and the loss of a vibrant, vigorous and innovative competitor, thereby creating higher prices and potential inconvenience to consumers. The elimination of Albertsons “may” certainly reduce the number of competing supermarkets servicing the areas where Albertsons and Kroger formerly competed and in doing so, substantially threatens to harm plaintiffs and customers through increases in the price of groceries, potentially translating to billions of dollars of harm to consumers annually, and further threatens to

⁴¹ The *American Stores* case included the acquisitions of the Lucky Store and Alfa Beta chains.

1 deprive customers of the unique style, affordability, service and experience offered by
2 Albertsons' grocery stores.

3 184. If Albertsons is eliminated, Plaintiffs and consumers "may" sustain irreparable
4 harm for which damages will be inadequate to compensate Plaintiffs in that the competition
5 from a rival competitor "may" be extirpated and customer choice for grocery options
6 eradicated. The imagination and initiative of Albertsons "may" be snuffed-out; expansion
7 plans "may" be jettisoned; customer convenience and satisfaction "may" be disregarded.
8 Albertsons services and competition, once lost, cannot be restored.

9 185. In addition, Kroger's acquisition (1) threatens to derail any proposed expansion
10 into other market by Albertsons, with a concomitant loss of jobs that would have otherwise
11 been created there; (2) threatens to derail any planned expansion of stores by Albertsons,
12 thereby lessening the overall capacity of grocery supply in the relevant markets; and (3)
13 threatens to substantially reduce the work force of the two grocery companies through
14 employee layoffs due to the elimination of competition.

15 186. Since the prospect of "start-up" the grocery market is unlikely, there "may" be
16 no entry of new competitors into the marketplace to mitigate the anticompetitive effects that
17 may result from Kroger's proposed acquisition. Significant barriers to entry in the grocery
18 market include the time and costs associated with conducting market research, selecting an
19 appropriate location for a supermarket, obtaining the necessary permits and approvals, and
20 constructing the new supermarket facilities.

21 187. Kroger as an existing supermarket business chain, however, has the
22 wherewithal, experience, financial ability, intent, and expertise to enter into the very same
23 markets and areas that it seeks to gain by its elimination of Albertsons. Such an entry by
24 Kroger into new markets would increase competition, create new jobs, increase capacity,
25
26
27
28

1 increase availability, and enhance consumer choice. The elimination of Albertsons would do
2 exactly the opposite.

3 188. Indeed, if there is to be any restoration of competition in the grocery industry as
4 a result of its relentless drive toward consolidation, Albertsons is the company that can do it.

5 189. Accordingly, Plaintiffs bring this action for both preliminary and permanent
6 injunctive relief against Defendants' proposed elimination of Albertsons and seek an order
7 prohibiting Kroger from acquiring Albertsons.
8

9 10 **VIOLATIONS ALLEGED**

11 Count One

12 Clayton Act, Section 7, 15 U.S.C. § 18

13 190. Plaintiffs hereby incorporate the allegations of paragraphs 1 through 189 above
14 as if fully set forth herein.

15 191. The effect of the proposed acquisition may be substantially to lessen
16 competition, or tend to create a monopoly, in interstate trade and commerce in the relevant
17 markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

18 192. Unless enjoined, the proposed acquisition may, and most probably would, have
19 the following potential effects in the relevant markets, among others:
20

21 (a) actual and potential competition between Kroger and Albertsons may be
22 eliminated;

23 (b) the elimination of Albertsons, a significant competitor in a non-trivial
24 transaction, may substantially lessen competition, or tend to create a monopoly in
25 the grocery supermarket industry;
26

27 (c) competition in general among other grocers may be lessened substantially;

28 (d) grocery prices may be higher than they otherwise would be;

1 (e) consumer choices may be lower than they otherwise would be; and

2 (f) food quality may be lessened.

3 193. The acquisition “may” have the following negative impacts in the national and
4 local markets for supermarket sales:

5 (a) Impact on consumers and on Plaintiffs:

6 i. Higher food prices. The acquisition would reduce competition in the
7 grocery industry, which would lead to higher food prices for consumers and Plaintiffs. This is
8 especially concerning given the current high inflation environment.

9 ii. Fewer choices. The acquisition would also reduce the number of
10 grocery chains that consumers and Plaintiffs can choose from. This would lead to less variety
11 and innovation in the grocery market.

12 iii. Lower quality products and services and availability. With the reduced
13 competition, the Kroger markets may have less incentive to provide high-quality products and
14 services to consumers and Plaintiffs and make them available to Plaintiffs and consumers on a
15 timely basis. There would be a reduction in the number of unique products available for
16 purchase.

17 (b) Impact on workers:

18 i. Job losses. The acquisition is expected to lead to job losses, as the
19 combined company consolidates operations and eliminated duplicate positions. Thousands of
20 workers and employees would be laid off or let go, which could have a severe economic
21 impact on the communities. This loss of jobs would not only affect the employees, but also
22 local businesses, as people would have less disposable income to spend on their goods and
23 services.

1 ii. Lower wages. The acquisition could also lead to lower wages for
2 grocery store workers, as the combined company would have more bargaining power in labor
3 negotiations.

4 (c) Impact on suppliers:

5 i. Lower prices. The merged company would have more buying power
6 than either Kroger or Albertsons alone. This would lead to lower prices for the merged
7 company's suppliers, including farmers and food manufacturers.

8 ii. Reduced access to market. The acquisition would also make it more
9 difficult for smaller suppliers to get their products onto the shelves of the merged company.
10

11 194. Overall, the proposed acquisition of Albertsons and Kroger has the potential to
12 have a negative impact on Plaintiffs, consumers, workers and suppliers.

13 195. In addition, the acquisition would have a negative impact on innovation in the
14 grocery industry. With less competition, the Kroger would be less likely to invest in new
15 products and services. This could lead to a less dynamic and innovative grocery market.
16

17 196. By reason of this violation, the Plaintiffs and all consumers are threatened with
18 loss or damage in the form of potentially higher grocery prices, diminished consumer
19 choices, the potential elimination of a favored supermarket, as well as additional irreparable
20 harm for which damages will be inadequate to compensate Plaintiffs. Plaintiffs are entitled
21 to bring suit under Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26, to obtain
22 preliminary and permanent injunctive relief against this proposed acquisition, and to recover
23 their costs of suit, including a reasonable attorney's fee.
24
25
26
27
28

SPECIAL PAYMENT

IN FURTHERANCE OF SECTION 7 VIOLATION

197. Albertsons is a publicly traded company. It is effectively controlled by a consortium of private equity entities, which collectively own approximately 75% of Albertsons stock.

198. On October 14, 2022, Kroger and Albertsons announced that they had “entered into an Agreement” whereby Kroger would acquire Albertsons, its significant rival, for \$24.6 billion. The Albertsons and Kroger acquisition agreement is memorialized in the “Agreement and Plan of Merger” document dated October 13, 2022.

199. As part of the acquisition transaction, Albertsons agreed to pay a special cash dividend of up to \$4 billion to the investor consortium of private equity entities and other shareholders. That special payment, which did not exist prior to the proposed acquisition, has now in fact been paid pursuant to the acquisition agreement. This special dividend would never have been paid, but for the acquisition, since the special dividend was part of, and inextricably tied to, the acquisition. If the acquisition is enjoined, this payment must be repaid to Albertsons by Kroger.

200. One of the purposes envisioned by Kroger for the special payment to the Albertsons shareholders was to hamper and cripple Albertsons as the number two supermarket competitor to Kroger in the United States in order to be able to compel Albertsons to accede to the acquisition by Kroger.

201. The scheme, which was intended to be and was in fact made in derogation of Albertsons’ minority shareholders and also in derogation of the integrity of Albertsons as an ongoing entity, was made and implemented in furtherance of defendants’ violation of Section

1 7 of the Clayton Antitrust Act which otherwise would prohibit Kroger from acquiring
2 Albertsons.

3 202. The issuance of the special payment to shareholders does not have any
4 procompetitive purpose and any arguable benefits of the special payment are outweighed by
5 their actual and likely anticompetitive effects.

6 203. One of the purposes of the special payment was to enrich the majority special
7 interest shareholders of Albertsons who are the primary beneficiaries of the agreed-upon \$4
8 billion special payment.

9 204. Another purpose of this scheme is to falsely create the supposed defense that
10 Albertsons is a failing company by sucking the lifeblood from a viable company.

11 205. Another purpose of this scheme is to eliminate Albertsons' cash-on-hand and to
12 nearly double its debt, putting Albertsons in a weakened competitive position relative to
13 Kroger, and thereby harming grocery consumers and workers throughout United States.

14 206. These Plaintiffs and all consumers are directly injured by reason of this special
15 payment because the ability of Albertsons to remain a viable company after the payment has
16 been compromised and Albertsons is no longer able to compete. Many of the Plaintiffs and
17 many consumers depend upon Albertsons for their everyday grocery needs. If Albertsons is
18 no longer able to provide these services, Plaintiffs and consumers are injured.

19 207. Moreover, many individuals depend on employment by these Albertson stores.
20 The reduced need for employees and suppressed wages for labor necessitated by reason of the
21 special dividend payment constitutes a significant competitive harm. This special dividend
22 has made it more difficult for Albertsons to compete for labor by reducing Albertsons' ability
23 to offer wage increases, pensions, or store improvements.

24 208. Albertsons plans to fund the special dividend by using \$2.5 billion in cash
25
26
27
28

1 and by taking on \$1.5 billion in new debt. This payment would eliminate more than half of
2 Albertsons' cash and its available liquidity will be reduced to less than one billion after the
3 special payment. The special dividend payment would increase Albertson's net debt by \$4
4 billion to \$8.54 billion. This lack of cash may hamper Albertsons' ability to continue to
5 compete in the short term and Albertsons may be unable to respond effectively to shifts in the
6 market through promotions and advertising and, more generally, Albertsons may have less
7 available cash to pay employee wages and benefits to retain staffing and may be unable to
8 make necessary investments in its stores.
9

10 209. Albertsons' lack of cash and deteriorating bond ratings may make access to
11 capital harder for Albertsons and may serve to curtail Albertsons' ability to compete on price,
12 services, quality, and innovation. The reduction in Albertsons' competitiveness may reduce
13 the intensity of price competition market-wide and, as a result, Plaintiffs and consumers
14 "may" likely pay more for their groceries, and enjoy fewer promotions, worse service, and
15 fewer quality-improving investments than they would but for Defendants' agreement to pay
16 the special dividend.
17

18 210. In addition, Albertsons' inability to invest in its stores and its workforce "may"
19 also likely harm workers who "may" experience lower wage growth and worse working
20 conditions than they would but for Defendants' agreement to pay the Special Dividend, which
21 "may" in turn affect Plaintiffs' and consumers' experiences while shopping at Albertsons'
22 stores.
23

24 211. It is probable that the \$4 billion special dividend, had it not been paid, could
25 have enabled Albertsons to lower prices, increase quality, hire employees, expand stores and
26 increase innovation in products and services – all of the beneficial effects of competition and
27
28

1 ensuing consumer welfare – and all of which could be attested to by the chief executive officer
2 of Albertsons upon examination.

3 212. This special dividend would never have taken place in the absence of the
4 agreement to be purchased by Kroger. Kroger agreed to the special dividend payment because
5 it knew that the special dividend would hamper any potential future competition from
6 Albertsons and would solidify their attempt to acquire Albertsons.
7

8 PRAYER FOR RELIEF

9 WHEREFORE, Plaintiffs request the following relief from this Honorable Court:

10 A. Declaring, finding, adjudging, and decreeing that the agreement of Kroger to
11 acquire Albertsons violates Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, and is
12 permanently enjoined.

13 B. Permanently enjoining Kroger from consummating the acquisition of
14 Albertsons;
15

16 C. Prohibiting any payment by Kroger to Albertson of any termination fee by
17 reason of this permanent injunction;

18 D. Ordering repayment and disgorgement of any of the \$4 billion in payments
19 made to the consortium of private equity entities and shareholders;
20

21 E. Permanently enjoining Albertsons from making any further Special Dividend
22 payments to any consortium of private equity entities as an act in furtherance of the
23 Defendants' violation of Section 7 of the Clayton Act.

24 F. Declaring void any agreement to pay the consortium of private equity entities
25 any amount by reason of the failure of the Albertsons acquisition as an act in furtherance of
26 the violations alleged;

27 G. Declaring the acquisition contract between the Defendants to be null and void;
28

1 H. Awarding to Plaintiffs their costs of suit, including a reasonable attorney's fee,
2 as provided by Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26; and

3 I. Granting to Plaintiffs such other and further relief to which they may be
4 entitled and which the Court finds to be just and proper.

5 DATED: January 10, 2024

By: /s/ Joseph M. Alioto

6 Joseph M. Alioto, Esq. (SBN 42680)
7 Tatiana V. Wallace, Esq. (SBN 233939)
8 ALIOTO LAW FIRM
9 One Sansome Street, Suite 3500
10 San Francisco, CA 94104
11 Telephone: (415) 434-8900
12 Email: jmalieto@aliotolaw.com

13 JURY DEMAND

14 Plaintiffs demand a trial by jury as their right under the Seventh Amendment to the
15 Constitution of the United States or as given by statute for all issues considered at law and not
16 in equity. Fed. R. Civ. P. 38.

17 ADDITIONAL PLAINTIFFS COUNSEL:

18 Lawrence G. Papale (SBN 67068)
19 LAW OFFICES OF LAWRENCE G. PAPALE
20 1308 Main Street, Suite 117
21 St. Helena, CA 94574
22 Telephone: (707) 963-1704
23 Email: lgpapale@papalelaw.com

24 Josephine Alioto (SNB 282989)
25 THE VEEN FIRM
26 20 Haight Street
27 San Francisco CA 94102
28 Telephone: (415) 673-4800
Email: jalioto@veenfirm.com